JOINT APPENDIX

Supreme Court, U. S.
FILED
DEC 30 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

[No. 74-80]

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Petitioners,

vs.

EDWIN H. HELFANT,

Respondent.

[No. 74-277]

EDWIN H. HELFANT,

Cross-Petitioner,

vs.

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Cross-Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 6, 1974
PETITION FOR CERTIORARI GRANTED NOVEMBER 18, 1974
CROSS-PETITION FOR CERTIORARI FILED SEPTEMBER 13, 1974
CROSS-PETITION GRANTED NOVEMBER 18, 1974

INDEX

	PAGE
Docket Entries, United States Court of Appeals for the Third Circuit	1a
Docket Entries, United States District Court for the District of New Jersey	15a
Indictment	18a
Notice of Motion to Dismiss Indictment	42a
Order of Judge Salvatore Denying Motion to Dismiss the Indictment	47a
Notice of Motion for Leave to Appeal in Appellate Division	49a
Orders of Appellate Division Denying Leave to Appeal	51a
Notice of Motion for Leave to Appeal and for Certification	54a
Orders of New Jersey Supreme Court Denying Motion for Leave to Appeal and for Certification	56a
Verified Complaint, dated May 2, 1973	60a
Affidavits, Annexed to Complaint	68a-1
Oral Testimony before Judge Kitchen	69a
Oral Opinion of Judge Kitchen	97a
Order of United States District Court Granting Petitioner's Motion to Dismiss the Complaint, dated May 9, 1973	100a
Opinion of the United States Court of Appeals for the Third Circuit, dated September 10, 1973	102a

PAGE

Certified Judgment in Lieu of Mandate, dated September 10, 1973 ..... 118a

Order Vacating Judgment, Granting Petition for Rehearing and Denying Petition for Rehearing En Banc, dated October 31, 1973 ..... 120a

Order Granting Rehearing En Banc, dated January 11, 1974 ..... 122a

Opinion of the United States Court of Appeals for the Third Circuit, En Banc, dated July 8, 1974 .... 123a

Certified Judgment in Lieu of Mandate, dated July 8, 1974 ..... 166a

Order Recalling Certified Judgment in Lieu of Mandate and Staying Issuance of Mandate dated July 23, 1974 ..... 168a

Letter dated October 31, 1972, to John F. Callinan from Patrick T. McGahn, Jr. 170a

Affidavit of Samuel Moore 171a

APPENDIX

Docket Entries, United States Court of Appeals for the Third Circuit

GENERAL DOCKET

APPEAL FROM DISTRICT OF NEW JERSEY (CAMDEN)

CASE No. 73-1386

EDWIN H. HELFANT,

Appellant,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY

No. Below: D. C. Civil 607-73

Judge Below: John J. Kitchen

Date of Judgment:

Notice of Appeal filed: May 11, 1973

Commenced in D. C. 5-3-73

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
5-11-73	Copy of Notice of Appeal, rec'd. from counsel, filed.
	Motion by appellant seeking injunction pending appeal, for an order granting a stay and injunction pending criminal proceedings in New Jersey Superior Court under Indictment No. SGJ 10-72-10, from the District Court order denying relief and dismissing complaint dated May 9, 1973, filed. (4 copies).
	Affidavit of service of above motion by appellant by hand delivery on May 10, 1973, filed.
5-14-73	Copy of Notice of Appeal ,rec'd. from D.C., filed.
5-14-73	Letter-Answer, dated May 14, 1973, from counsel for appellees to appellant's motion seeking injunction pending appeal, etc., filed. (1 copy), Proof of service in letter-answer.
5-14-73	Documents filed in the District Court, Motion to Dismiss Complaint, and supporting brief in support of appellees' letter-answer, rec'd. for the information of the Court. (4 copies).
5-14-73	Submitted on appellant's motion seeking injunction pending appeal., for an order granting a stay and injunction pending criminal proceedings, etc., Coram; Van Dusen, Gibbons and Rosenn.
5-16-73	Appearance of Marvin D. Perskie, Esq.; and Patrick T. McGahn, Jr., Esq.; Perskie and Callinan for appellant, filed.

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
5-17-73	Order (*Van Dusen,* Gibbons and Rosenn) denying appellant's motion seeking injunction pending appeal, for an order granting a stay and injunction pending criminal proceedings in New Jersey Superior Court under Indictment No. SGJ 10-72-10, from the District Court order denying relief and dismissing complaint dated May 9, 1973, filed.
5-17-73	CC of above order to C of D.C.
5-17-73	Record and Exhibits, rec'd. May 15, 1973, filed.
5-18-73	Appearance of Edward C. Laird, Esq. for appellees, filed.
6-11-73	Copy of letter dated June 8 rec'd from Clerk of Supreme Court advising that a motion for injunction pending disposition of Third Circuit Court of Appeals was denied by Mr. Justice Brennan.
6-25-73	Brief for appellant and appendix, filed. (25 cc.). Affidavit of service by mail on June 21, 1973 attached to brief.
7-24-73	Brief for appellee (and appendix red'd. for information of the Court), filed. Affidavit of service by mail on July 23, 1973 attached.
7-30-73	Letter in lieu of reply brief for appellant, filed. (25 copies). Proof of service in letter.
8- 2-73	Motion by appellant, with affidavit in support, to schedule appeal for an immediate hearing,

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
	so that a decision may be rendered prior to September 10, 1973, filed. (5 cc.). Proof of mailings attached.
8- 6-73	Memorandum in Opposition by appellees to appellant's motion, filed. (5 cc.). Affidavit of service attached.
8- 6-73	Submitted on above motion. Coram: Adams and Rosenn.
8- 8-73	Order (*Adams* and Rosenn) granting appellant's motion to schedule appeal for an immediate hearing so that a decision may be rendered prior to September 10, 1973, and the case will be listed for disposition on the merits during the week of September 4, 1973, filed.
8-21-73	Letter dated August 20, 1973 rec'd from Marvin D. Perskie, Esq. for the information of the Court.
9- 7-73	Argued. Coram: Staley, Adams and Gibbons.
9- 7-73	Order (Staley, *Adams* and Gibbons) staying the state criminal action until further order of this court, which shall be entered no later than September 12, 1973, filed.
9- 7-73	Certified copy of above order to C. of D.C.
9-10-73	Opinion Per Curiam (Staley, Adams and *Gibbons*), (with *Adams* concurring), filed.
9-10-73	Judgment (Staley, Adams and Gibbons), attested by *Clerk,* reversing the order of the

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
	district court, filed May 9, 1973, which order dismissed the complaint for failure to state a claim upon which relief could be granted; vacating the order of the District Court, filed May 9, 1973, which order denied plaintiff's motion for a preliminary injunction and remanding the cause to the District Court for the entry of an order temporarily enjoining the trial of Indictment No. SGJ 10-72-10 until final hearing, and for the entry of an order consolidating hearing on the motion for a preliminary injunction with the trial on the merits; and directing that the trial be commenced forthwith, and that the district court shall make findings of fact and conclusions of law within 30 days from the date of the mandate of this court, all in accordance with the opinion of this Court, filed.
9-10-73	Order, attested by *Clerk,* directing that the certified judgment in lieu of formal mandate issue forthwith, in accordance with the opinion of this Court, filed.
9-10-73	Order (Staley, *Adams* and Gibbons) vacating this Court's order of September 7, 1973, which stayed the proceedings in the State Court, filed.
9-10-73	Certified judgment in lieu of formal mandate issued.
9-10-73	Certified copies of orders filed September 10, 1973 to C. of D.C.

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
9-10-73	Record and exhibits returned to C. of D.C.
9-12-73	Receipt for record and exhibits rec'd from C. of D.C., filed.
9-19-73	Application by appellee for an order staying the judgment in lieu of mandate pending disposition of petition for rehearing en banc, considered by counsel for appellant as a motion to recall mandate, filed. (4 cc.). Proof of service attached.
9-19-73	Brief and appendix for appellee in support of application for an order staying the judgment in lieu of mandate, etc., filed. (4 cc.). Proof of service attached to application.
9-21-73	Order (Staley, Adams and *Gibbons*) recalling the mandate of this Court pending the filing by appellees of petition for rehearing en banc and the disposition by this Court of such petition, filed.
9-21-73	Certified copy of above order to C. of D.C.
9-25-73	Motion by appellees for leave to file petition for rehearing in excess pages, filed. (4 cc.). Affidavit of service attached.
9-26-73	Motion by appellees, with affidavit in support, for leave to file their petition for rehearing as within time, or alternatively, filing the petition for rehearing out of time, filed. (4 cc.) Affidavit of service attached.

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
9-26-73	Motion by appellant, with affidavit in support, for an order restoring the mandate, filed. (5 cc.). Proof of mailing attached.
10- 4-73	Order (Adams, *Gibbons* and Staley) granting appellees' motion for leave to file their petition for rehearing out of time; and denying appellant's motion for an order restoring the mandate, filed.
10- 4-73	Petition for rehearing en banc, rec'd September 25, 1973, filed. (25 cc.). Certificate of service by mail on September 24, 1973 attached to petition.
10-31-73	Order (Seitz, Chief Judge, Staley, Van Dusen, Aldisert, Adams, *Gibbons,* Rosenn, Hunter, Weiss, Garth, Circuit Judges) denying petition for rehearing en banc; vacating the judgment of this Court, directing the Clerk of this Court to list this case for submission to a panel consisting of Judges Staley, Adams and Gibbons pursuant to Rule 12(6) on November 19, 1973; and directing the parties to, simultaneously, on or before November 10, 1973, file with this Court, supplemental briefs on the question whether, assuming appellant's testimony before the grand jury was coerced, he has standing on that ground to object to a trial on Indictment No. SGJ-10-72-10 or on any count thereof; see *Gelbard* v. *U.S.,* 408 U.S. 41, 60 (1972); *U.S.* v. *Blue,* 384 U.S. 251, (1966); *Lawn* v. *U.S.,* 355 U.S. 339 (1958);

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
	compare *Garrity* v. *New Jersey,* 385 U.S. 493, (1967), filed.
10-31-73	Certified copy of above order to Clerk of District Court.
11- 7-73	Supplemental brief for appellant (and appendix), filed. (25 copies)
11-10-73	Supplemental brief for appellees, rec'd November 13, 1973, filed. (25 copies)
11-13-73	Letter dated November 12, 1973 enclosing opinion of Sixth Circuit in *U.S.* v. *Calandra,* No. 71-1999, decided July 27, 1972, rec'd from Marvin D. Perskie, Esquire for the information of the Court.
11-15-73	Motion by appellant to expunge supplemental brief, filed. (6 copies) service attached.
11-19-73	Submitted on rehearing before the Original Panel. Coram: Staley, Adams & Gibbons, Circuit Judges.
11-19-73	Motion by appellees to strike Affidavit of Samuel Moore which is annexed to appellants' supplemental brief and appendix and
	Brief in Support of motion to Strike Affidavit, filed. (4 copies) service attached.
11-19-73	Brief and Affidavit in Opposition to motion to strike affidavit of Samuel Moore rec'd from counsel for appellant, filed. (5 copies) service attached.

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
11-21-73	Letter dated November 19, 1973 rec'd from David S. Baime, Esquire for the information of the Court.
11-21-73	Affidavit of Appellees in Opposition to appellants' motion to Expunge supplemental brief, filed. (4 copies) service attached.
11-27-73	Letter dated November 26, 1973 with enclosure, full context of S.C. of U.S. opinion in *Lefkowitz, et al., Appellants* v. *M. Russell Turley, et al.,* decided 11-19-73 rec'd from Marvin D. Perskie, Esquire for the information of the Court.
11-27-73	Reply brief of appellees, received for information of the Court. (3 cc) Not filed
11-27-73	Affidavit of service of above, rec'd. Unless Court directs
12- 4-73	Letter dated November 30, 1973 from counsel for appellees for the information of the Court.
1-11-74	Order (Seitz, Chief Judge and Staley, Van Dusen, Aldisert, *Adams,* Gibbons, Rosenn, Hunter, Weis and Garth, Circuit Judges) directing that the Clerk of this Court list this case for rehearing en banc at the convenience of the Court, filed.
1-11-74	Uncertified record in D.C. Civil No. 607-73 returned to Clerk of District Court with request that it be certified and returned to this office
1-15-74	Record and exhibits filed.

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
1-16-74	Letter brief dated January 14, 1974 rec'd from David S. Baime, Esquire for the information of the Court.
1-18-74	Appearance of David S. Baime, Esquire in lieu of Edward Laire, counsel for appellee, filed.
1-18-74	Letter brief of appellant dated January 18, 1974 rec'd from Marvin D. Perskie, Esq. for the information of the Court.
2- 7-74	Order (*Seitz,* Staley, Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis and Garth) denying appellant's motion to expunge supplemental brief of appellees and deferring appellees' motion to strike affidavit of Samuel Moore annexed to appellant's supplemental brief until the appeal is considered by the Court, filed.
2- 7-74	Brief and appendix for appellant in response to the Court's request, filed. (11 copies Affidavit of Service above, filed.
2- 9-74	Supplemental brief for appellees, rec'd February 12, 1974, filed and appendix rec'd for the information of the Court. (11 copies) service attached.
2-13-74	Reply brief for appellant, rec'd February 13, 1974. (11 copies) (for the information of Court —not filed unless Court directs).
3- 4-74	Letter dated March 1, 1974 rec'd from Marvin D. Perskie, Esquire for the information of the Court.

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
3-11-74	Letter dated March 8, 1974 rec'd from Marvin D. Perskie, Esquire for the information of the Court.
3-18-74	Letter dated March 14, 1974 rec'd from Marvin D. Perskie, Esquire for the information of the Court.
3-19-74	Order dated February 13, 1974 (Seitz, Chief Judge) directing 30 mins. argument for each side, filed.
3-26-74	Letter dated March 25, 1974 enclosing copy of opinion of U.S. Supreme Court in case of Steffel v. Thompson, No. 73-5581, appearing in Vol. 14, No. 23, Sec. 3 designated 14 CrL 3123, Crim. Law Reporter Mar. 20, 1974, rec'd from Marvin D. Perskie, Esquire for the information of the Court.
4-10-74	Reargued en banc Coram: Seitz, Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis and Garth, C.J.
4-12-74	Letter dated April 11, 1974, together with enclosures, received from Marvin D. Perskie, Esquire for the information of the Court.
5- 6-74	Letter dated May 3, 1974, rec'd from Marvin D. Perskie, Esq., for the information of the Court.
5-30-74	Letter dated May 29, 1974, rec'd from Marvin D. Perskie, Esq., for the information of the Court. (11 cc.)

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
5-31-74	Letter dated May 25, 1974, together with enclosure, rec'd from Marvin D. Perskie, Esq., rec'd for the information of the Court. (10 cc.)
6- 4-74	Letter dated June 3, 1974, together with enclosure, rec'd from David S. Baime, Esq., rec'd for the information of the Court. (10 cc.)
6- 8-74	Letter dated June 6, 1974, rec'd from Marvin D. Perskie, Esq., recd'd for the information of the Court.
7- 8-74	Opinion of the Court (Seitz, Chief Judge, and Van Dusen, *Aldisert,* Adams, Gibbons, Rosenn, Hunter, Weis and Garth, Circuit Judges) with separate dissenting opinion by Judge Adams, filed.
7- 8-74	Judgment on Rehearing reversing the order of the District Court, filed May 9, 1973, which dismissed the complaint; vacating the order entered May 9, 1973 denying the motion for a preliminary injunction; and remanding the cause to the district court for the entry of an order temporarily enjoining the trial of Indictment No. SGJ-10-72-10 in the New Jersey courts until completion of the proceedings in the district court unless the State of New Jersey stipulates to a postponement thereof. The district court proceeding shall be limited to a determination of whether Helfant's testimony before the state grand jury on November 8, 1972, was the product of a free and unconstrained will. It shall issue a declaratory judgment setting forth its conclusions; directing that the trial be commenced forthwith and that the district court shall make findings of fact and conclusions of law within thirty days from the issuance of the mandate of this Court, filed.

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
7- 8-74	Order (Clerk) directing that the certified judgment in lieu of formal mandate issue forthwith in accordance with the opinion of this Court, filed.
7- 8-74	Recalled 7/23/74.
7- 8-74	Certified copy of order directing immediate issuance of the mandate sent to Clerk of District Court.
7- 8-74	Record and exhibits returned to Clerk of District Court.
7-10-74	Receipt for record and exhibits from Clerk of District Court, filed.
7-12-74	Motion by appellees to recall judgment in lieu of formal mandate, filed. Affidavit of service attached.
7-12-74	Verified Affidavit in Support of Motion to Recall, etc., filed. (10 copies).
7-12-24	Brief in Support of Motion, to Recall, etc. filed.

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
7-18-74	Brief in Opposition to Motion to Recall Judgment, etc. and Stay the Effect Thereof, filed. (10 copies) Certificate of service attached.
7-23-74	Order (CLERK) (Seitz, Chief Judge and Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis and Garth, Circuit Judges) recalling the certified judgment issued in lieu of formal mandate on July 8, 1974, and staying the issuance of the judgment in lieu of formal mandate until August 7, 1974, filed.
8- 6-74	Certified copy of partial proceedings in this Court for filing with petition for writ of certiorari forwarded to Clerk of Supreme Court.
8- 9-74	Certificate of docketing of petition for writ of certiorari on August 6, 1974, from Clerk of Supreme Court, filed. (S.C. No. 74-80).
8-10-74	Notice of filing on August 6, 1974, of petition for writ of certiorari, received from Clerk of Supreme Court, filed. (S.C. No. 74-80).
9-19-74	Notice of filing of petition for writ of certiorari on September 13, 1974 received from the Clerk of the Supreme Court, filed (S.C. No. 74-277).
9-20-74	Certified copy of all proceedings not included in certification of August 6, 1974 prepared and forwarded to the Clerk of the Supreme Court pursuant to the request of counsel for appellant.

Docket Entries, United States District Court for the District of New Jersey

GENERAL DOCKET

CIVIL 607-73

EDWIN H. HELFANT,

Appellant,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY

Basis of Action: Civil Rights Act—to Injoin & Restrain Prosecution

Date	*Filings—Proceedings*
5- 3-73	Complaint, filed
5- 3-73	Summons issued
5- 3-73	Order to show cause why temporary injunction should not issue, returnable May 9, 1973, filed (Cohen)
5- 3-73	Notice of Allocation and Assignment, filed

Docket Entries, United States District Court
for the District of New Jersey

Date	*Filings—Proceedings*
5- 8-73	Notice of motion by defendants for an order dismissing complaint, filed
5- 9-73	Hearing on return of Order to show cause why temporary injunction should not issue
	Oral Findings of Fact and Conclusions of Law; Ordered Petition for temporary injunction DENIED;
	Ordered motion by defts to dismiss action for lack of jurisdiction DENIED;
	Ordered motion by defts to dismiss action for failure to state a claim GRANTED—Order to be submitted (Kitchen)
5- 9-73	Transcript of Oral Opinion, filed
5- 9-73	Order denying Defendants motion to dismiss for lack of Jurisdiction; Granting Defendants motion to dismiss for failure to state a claim; and Denying a stay pending appeal, all without costs, filed (Kitchen) Notices mailed
5-10-73	Transcript of Hearing, filed
5-11-73	Notice of Appeal, filed
5-14-73	Record on Appeal, mailed Clerk, U.S. Court of Appeals (Notice furnished all Counsel)
5-18-73	Certified copy of Order of U.S.C.A. denying Appellant's Motion for Injunction pending appeal, etc., filed
9-10-73	Certified copy of Order of U.S.C.A. staying State Criminal Action, filed

Docket Entries, United States District Court
for the District of New Jersey

Date	*Filings—Proceedings*
9-11-73	Certified copy of Judgment of U.S. Court of Appeals Reversing District Court together with copy of Opinion, filed
9-17-73	Summons returned, served on May 14, 1973, filed
9-17-73	Petition for Writ of Habeas Corpus ad Testificandum, filed
9-17-73	Writ of Habeas Corpus issued (Cohen, C. J.)
9-24-73	Certified copy of Order of U.S.C.A. recalling Mandate pending the filing by Appellees of a Petition for rehearing en banc, filed
11- 1-73	Certified copy of Order of U.S. Court of Appeals denying Petition for Rehearing en banc, etc., filed

Indictment

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—CRIMINAL

STATE GRAND JURY NUMBER SGJ 10-72-10

DOCKET NUMBER .....

INDICTMENT

STATE OF NEW JERSEY

v.

EDWIN H. HELFANT, SAMUEL MOORE

COUNT I

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant and Samuel Moore between on or about March 17, 1968, and on or about September 10, 1968, at the City of Egg Harbor City, in the County of Atlantic; at the City of Atlantic City, in the County of Atlantic; at the City of Somers Point, in the County of Atlantic, and elsewhere, and within the jurisdiction of this Court; knowingly, willfully and corruptly did conspire, confederate and agree together, with each other, and with John Cantoni, Shelly Kravitz, John Anderson, Harold Garber, Richard Cantoni, also known as Babe, Dominick Perri

and William H. Hicks who are named as co-conspirators but not as defendants herein, to commit acts for the perversion and obstruction of justice and due administration of the laws; the said Edwin H. Helfant and the said Samuel Moore then and there knowing that a criminal complaint in the case of State v. John Cantone, Docket No. C-251 for 1968, was pending in the Municipal Court of the City of Egg Harbor City aforesaid, the said matter involving a charge that John Cantoni did commit atrocious assault and battery upon William H. Hicks and Eugene Summerson on March 17, 1968; and the said Samuel Moore then and there being the Municipal Court Judge in the City of Egg Harbor City; that is, knowingly, willfully and corruptly to use the power and influence of the public office of the said Samuel Moore to obtain action in the Municipal Court of Egg Harbor City, favorable to the defendant, John Cantoni, and against the interests of the State of New Jersey, the County of Atlantic and the City of Egg Harbor City, thereby interfering with the goals and aims of the judicial process and denying the public the benefits and protections of the criminal laws of the State of New Jersey, to the obstruction, hinderance and impedance of the due course of public justice.

It was a part of the said conspiracy that William H. Hicks would withdraw the aforesaid complaint, drop the charge of atrocious assault and battery and not continue the criminal prosecution.

It was further a part of the said conspiracy that the said Samuel Moore would violate the duties of his judicial office which he was sworn and required by law to uphold, including the duties imposed by N.J.S.A. 2A:8-23, R.R. 8:4-10 of Court Rules, and the Municipal Court

Indictment

Manual, by knowingly, willfully and corruptly authorizing, securing and bringing about the dismissal of the aforesaid complaint without notifying the Atlantic County Prosecutor of the dismissal and without furnishing the Atlantic County Prosecutor with an opportunity to be heard on the matter; and by willfully misrepresenting to the Municipal Court Clerk for the City of Egg Harbor City that approval had been granted by the Atlantic County Prosecutor's Office for the dismissal of the aforesaid complaint.

The Grand Jurors aforesaid, upon their oaths, do further present that in execution of the said conspiracy and to effect the objects thereof, the following overt acts were committed:

OVERT ACTS

1. On or about March 17, 1968, at the City of Atlantic City, in the County of Atlantic, Edwin H. Helfant did communicate by telephone with Shelly Kravitz and then and there Edwin H. Helfant did tell Shelly Kravitz that he wanted to meet him the following day and discuss the assault by John Cantoni upon William H. Hicks which had occurred earlier that morning.

2. On or about March 18, 1968, Edwin H. Helfant did meet with Shelly Kravitz, at the City of Atlantic City in the County of Atlantic, and then and there Edwin H. Helfant did say that if John Cantoni paid the sum of $5,000 he would see to it that no charges were pressed.

3. On or about March 18, 1968, Shelly Kravitz, at the City of Atlantic City, in the County of Atlantic, did communicate with John Cantoni and did relate to him a conversation he had with Edwin H. Helfant.

Indictment

4. On or about March 19, 1968, Edwin H. Helfant did meet with Shelly Kravitz, at the City of Atlantic City, in the County of Atlantic, and then and there Edwin H. Helfant stated that if John Cantoni paid the sum of $3,000 charges would not be pressed for the assault by John Cantoni against William H. Hicks, but if the money were not paid he would personally prosecute the case before Judge Moore in Egg Harbor City.

5. On or about March 19, 1968, at the City of Atlantic City, in the County of Atlantic, Shelly Kravitz did meet with John Cantoni and did relate to him the conversation he had with Edwin H. Helfant earlier that day.

6. Between on or about March 29, 1968, and on or about April 21, 1968, at the City of Somers Point, in the County of Atlantic, Richard Cantoni, also known as Babe, did meet with Edwin H. Helfant and did discuss the payment of a sum of money by John Cantoni to Edwin H. Helfant in return for the withdrawal of the complaint filed against John Cantoni by William H. Hicks.

7. Between on or about April 21, 1968, and on or about June 5, 1968, John Cantoni did meet with Harold Garber at the Algiers Lounge at the City of Atlantic City, in the County of Atlantic, and then and there they did discuss the paying of money to Edwin H. Helfant by John Cantoni for the withdrawal of the complaint filed by William H. Hicks against John Cantoni.

8. At the end of May or the beginning of June, 1968, at the City of Atlantic City, in the County of Atlantic, John Cantoni did give $1,700 to John Anderson.

Indictment

9. On or about June 7, 1968, at the City of Somers Point, in the County of Atlantic, William H. Hicks did recieve a sum of money in the amount of $1,500 from Edwin H. Helfant.

10. Between on or about June 7, 1968, and on or about July 20, 1968, at the City of Egg Harbor City, in the County of Atlantic, Samuel Moore did direct Alolph Joseph to write the words "We do hereby withdraw the within complaint against John Contoni" on the back of the complaint filed against John Cantoni by William H. Hicks, in the case of State v. John Cantone, Docket No. C-251 for 1968, and Samuel Moore did then take the complaint from the Municipal Court of Egg Harbor City.

11. On or about July 20, 1968, at the City of Atlantic City, in the County of Atlantic, William H. Hicks did sign his name on the back of the complaint he filed against John Cantoni charging Cantoni with atrocious assault and battery, in the case of State v. John Cantone, Docket No. C-251 for 1968, under the printing: "We do hereby withdraw the within complaint against John Cantone" and above the typing "William H. Hicks".

12. On or about July 20, 1968, at the City of Atlantic City, in the County of Atlantic, Edwin H. Helfant did sign his name on the back of the complaint filed by William H. Hicks and Eugene Summerson against John Cantoni, in the case of State v. John Cantone, Docket No. C-251 for 1968, over the typing "Witness as to Eugene Summerson".

13. On or about September 10, 1968, at the City of Egg Harbor City, in the County of Atlantic, Samuel

Indictment

Moore did return the complaint filed by William H. Hicks and Eugene Summerson against John Cantoni, in the case of State v. John Cantone, Docket No. C-251 for 1968, to Adolph Joseph, did show him the signature and typing on the back of the complaint and did tell Adolph Joseph that permission had been granted by the Atlantic County Prosecutor's Office to dismiss the complaint and that the signature over the typed lines "Witness as to William H. Hicks" and "Witness as to Eugene Summerson" were those of people from the Atlantic County Prosecutor's Office.

All in violation of N.J.S. 2A:98-1 and N.J.S. 2A:98-2, and against the peace of this State, the government and dignity of the same.

COUNT II

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant and Samuel Moore between on or about March 17, 1968, and on or about September 10, 1968, at the City of Egg Harbor City, in the County of Atlantic; at the City of Atlantic City, in the County of Atlantic; at the City of Somers Point, in the County of Atlantic, and elsewhere, and within the jurisdiction of this Court; the said Samuel Moore then and there being a public officer, that is, Judge of the Municipal Court for the City of Egg Harbor City; and the said Edwin H. Helfant and Samuel Moore then and there knowing that a matter was pending in the Municipal Court for the City of Egg Harbor City, the said matter involving a criminal complaint which was filed by William H. Hicks and Eugene Summerson against John Cantoni charging atrocious assault and battery, in

the case of State v. John Cantone, Docket No. C-251 for 1968; and the said Edwin H. Helfant and Samuel Moore contriving and intending to obstruct, hinder and impede the due course of public justice and the due administration of laws in the said matter; willfully, knowingly and corruptly did use the power and influence of the public office of the said Samuel Moore to obtain action in the Municipal Court for the City of Egg Harbor City favorable to the defendant, John Cantoni, and against the interests of the State of New Jersey in the said matter, by knowingly, willfully and corruptly authorizing, securing and bringing about the dismissal of the aforesaid complaint without notifying the Atlantic County Prosecutor of the dismissal and without furnishing the Atlantic County Prosecutor with an opportunity to be heard on the matter; and by intentionally misrepresenting to the Municipal Court Clerk for the City of Egg Harbor City that approval had been granted by the Atlantic County Prosecutor's Office for the dismissal of the aforesaid complaint; to the obstruction, hinderance and impedance of the due course of public justice; all in violation of the provisions of N.J.S. 2A:85-1 and N.J.S. 2A:85-14, and against the peace of this State, the government and dignity of the same.

COUNT III

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant between on or about March 17, 1968, and on or about September 10, 1968, at the City of Egg Harbor City, in the County of Atlantic; at the City of Atlantic City, in the County of Atlantic; at the City of Somers Point, in the County of Atlantic, and elsewhere, and within the jurisdiction of

this Court, the said Edwin H. Helfant then and there knowing that a criminal complaint was pending in the Municipal Court of Egg Harbor City aforesaid, in the case of State v. John Cantone, Docket No. C-251 for 1968, the criminal complaint charging that John Cantoni did commit atrocious assault and battery upon the said William H. Hicks and Eugene Summerson at the City of Egg Harbor City, on March 17, 1968, in violation of N.J.S. 2A:90-1, the said allegation that John Cantoni committed atrocious assault and battery upon William H. Hicks and Eugene Summerson being a true, accurate and valid charge of an offense indictable at law in New Jersey, did willfully and knowingly aid, abet, counsel, command, induce, procure, and cause William H. Hicks to accept, take, and receive a sum of money to compound an indictable offense under the laws of the State of New Jersey, that is, for William H. Hicks to withdraw the aforesaid complaint, to drop the charges and not to continue the criminal prosecution for the said indictable offense in return for the receipt by him of a sum of money, in violation of N.J.S. 2A:97-1 and N.J.S. 2A:85-14, and against the peace of this State, the government and dignity of the same.

COUNT IV

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Samuel Moore on or about September 10, 1968, at the City of Egg Harbor City, in the County of Atlantic, and elsewhere, and within the jurisdiction of this Court, the said Samuel Moore then and there being a public officer, that is, Judge of the Municipal Court for the City of Egg Harbor City, aforesaid, and the said Samuel Moore then and there having

by reason of such public office the duties, among others, to display good faith, honesty and integrity and to be impervious to corrupting influences, and to enforce the laws of the State of New Jersey to the best of his ability, uninfluenced by motives adverse to the best interests of the City of Egg Harbor City, the County of Atlantic, and the State of New Jersey, to transact the business of his said public office frankly and openly in the light of public scrutiny so that the public may know and be able to judge him and his work fairly; to abide by the commands in the Canons of Judicial Ethics to promote justice, to conduct himself above reproach, to administer justice according to law and not to allow other affairs or private interests to interfere with the prompt and proper performance of his judicial duties; and to abide by N.J.S. 2A:8-23, and the 1968 New Jersey Court Rules, R.R. 8:4-10, and the Municipal Court Manual requiring that a complaint pending in a municipal court wherein an offense indictable at law is charged not be discharged and dismissed without giving the County Prosecutor prior notice and an opportunity to be heard; did knowingly, willfully, and corruptly engage in misconduct in his said public office; that is, the said Samuel Moore did breach and violate the aforesaid duties by using the power and influence of his said public office to obtain action in the Municipal Court of the City of Egg Harbor City favorable to John Cantoni and against the interests of the State of New Jersey, the County of Atlantic and the City of Egg Harbor City, by knowingly, willfully and corruptly authorizing, securing and bringing about the dismissal of a complaint charging atrocious assault and battery, a high misdemeanor and an indictable offense, in the case of State v. John Cantone, Docket No. C-251 for 1968, without notifying the Atlantic County Prose-

cutor of the dismissal and without furnishing the Atlantic County Prosecutor with an opportunity to be heard; and by misrepresenting to the Municipal Court Clerk for the City of Egg Harbor City that approval had been granted by the Atlantic County Prosecutor's Office for the dismissal of the aforesaid complaint; in violation of N.J.S. 2A:85-1, and against the peace of this State, the government and dignity of the same.

COUNT V

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Samuel Moore on October 25, 1972, at the City of Trenton, in the County of Mercer, and within the jurisdiction of this Court, did commit willful false swearing in the manner and form following to wit:

1. On the day aforesaid, in the City and County aforesaid, a criminal investigation was pending before the State Grand Jury which investigation concerned the activities of Edwin H. Helfant and Samuel Moore and divers other persons associated with them in connection with the crimes of conspiracy (N.J.S. 2A:98-1 and 2), compounding a crime (N.J.S. 2A:97-1), misconduct in office (N.J.S. 2A:85-17) and obstruction of justice (N.J.S. 2A:85-1), and which investigation the Grand Jury then and there had lawful power and authority to conduct.

2. In the course of said investigation the aforesaid Samuel Moore was called before the State Grand Jury and then and there was duly and regularly sworn as a witness before the State Grand Jury by the foreman thereof, the said Samuel Moore then and there taking the oath

that the evidence which he should give to the State Grand Jury should be the truth, the whole truth and nothing but the truth, and the foreman then and then having competent authority to administer such oath to the said Samuel Moore in that behalf.

3. Upon the said Samuel Moore being sworn, it was then and there inquired about the knowledge of the said Samuel Moore about a criminal complaint, in the case of State v. John Cantone, Docket No. C-251 for 1968, and the manner in which the aforesaid complaint was dismissed without the approval or the knowledge of the Atlantic County Prosecutor's Office.

4. In reference to the aforementioned matter under inquiry the said Samuel Moore then and there before the State Grand Jury falsely, willfully, intentionally and knowing the same to be false, said, deposed, swore and gave in evidence testimony, in effect that in 1968 he had no knowledge of and did not participate in the disposition of the aforesaid complaint, that is, that he never saw the aforesaid complaint, that he never directed Adolph Joseph to make any writing on the back of the complaint, that he never took the complaint from the Municipal Court of the City of Egg Harbor City, that he never told Adolph Joseph that approval had been given by the Atlantic County Prosecutor's Office to dismiss the complaint and that he never authorized the dismissal of the aforesaid complaint as follows:

> Q. Did you in June of 1968 instruct Ady Joseph to write, "We do hereby withdraw the within complaint against John Cantoni"?
>
> A. Oh, no, impossible.
>
> Q. You are absolutely certain?

A. Absolutely impossible. I couldn't possibly do such a thing.

Q. You never saw this complaint before—

A. August of this year.

Q. You never instructed Mr. Joseph to print, "We do hereby withdraw the within complaint against John Cantoni"?

A. No, sir.

Q. Did you after instructing Mr. Joseph to do that printing, follow the complaint up?

A. What was that?

Q. I said, did you, after having instructed Mr. Joseph to print it—

A. I didn't do such a thing.

Q. Did you—okay, strike that, excuse me.

Did you ever, after showing the complaint to Mr. Joseph follow the complaint up?

A. I didn't see the complaint until August of this year. I just testified that I did not see these papers until August of this year. So I couldn't possibly have talked to Mr. Joseph or directed him to do anything as far as these papers are concerned.

Q. Judge, I'm going to ask the questions and you, if you didn't do it, you could say you did not do it.

A. Yes, sir.

Q. Did you ever follow that complaint up and tell Mr. Joseph you were going to take it to the Atlantic County Prosecutor's Office to have them authorize the withdrawal of that complaint?

A. No, sir.

Q. Did there ever come a time, Judge Moore, that in July of 1968 Mr. Joseph asked you what happened to the complaint, that in June you told him you were going to take it to the prosecutor's office,

and you told him you forgot about it, but that you will get the authorization from the prosecutor's office?

A. That's a deliberate lie if that were said.

Q. Judge Moore, did there ever come a time in September of 1968 where you brought that complaint back and told Mr. Joseph that the complaint had been withdrawn by Hicks and Summerson and that those were their signatures?

Excuse me, on the right-hand side, William Hicks and Eugene Summerson and the signature witness as to Hicks and the witness as to Summerson was the authorization from the Atlantic County Prosecutor's Office to withdraw the

A. Anybody who made that statement, it's a deliberate lie. I'm one of the few people, and probably the only one who can recognize Helfant's signature. That's his signature there.

If I had anything to do with the complaint and these signatures, I certainly wouldn't stand for Helfant, a municipal judge, signing as a witness for dismissing an indictable offense, which would be improper. I can't understand Helfant's doing such a thing. That's stupidity.

Q. Judge, again, just to get your—what appears to be your denial on the record—did you tell Mr. Joseph that you received authorization from the Atlantic County Prosecutor's Office to withdraw the complaint and that the signatures on the left-hand side of the complaint, witness as to Willliam H. Hicks, witness as to Eugene Summerson dated July 20, 1968 were the signatures of the prosecutor's office authorizing the withdrawal of the complaint?

A. No.

Q. No, sir, you do not?

A. No, sir.

Q. Now, do you recognize any of the signatures on this complaint?

A. The only signature I recognize is Helfant. I don't know Hick's signature, Summerson's signature. I never saw Hicks in my life until about five weeks ago. I don't know who this man is, Parri. I don't even know what the name is. I never saw that before.

Q. And whose signature is it over the line, "Witness as to Eugene Summerson"?

A. That's Edward Helfant.

Q. Have you seen Helfant's signature before?

A. Oh, yes, I had a copy of it. I went to the bank about a month ago, they had just cashed a check of his. I had a photocopy made of it. It disappeared somehow or other, but that's his signature.

Q. Judge, is there any doubt in your mind that that's Mr. Helfant's signature?

A. No doubt at all.

Q. Again, Judge, for the record, this complaint says, "Returned 9/10/68." Do you recognize the printing, "Returned"?

A. No, sir.

Mr. Joseph told me he wrote that.

Q. Is that your printing?

A. No, sir.

Q. Did you give the complaint back to Mr. Joseph on 9/10/68 and tell him to enter a dismissal on the docket?

A. No, sir; no, sir.

Q. Judge, would the fact that Mr. Joseph testified under oath before this grand jury, that in June

of '68 you authorized him to write on Exhibit 1, "We do hereby withdraw the within complaint against John Cantoni", that subsequently you said you were taking it to the prosecutor's office, that subsequently he asked you in July what happened to the complaint and you told him you had forgotten about it, you were going to get authorization, and that on September 10, 1968 you returned the complaint to him and told him that the signatures on the left-hand side were from the Atlantic County Prosecutor's Office that authorization had been granted to dismiss the complaint and that he was to enter a dismissal on the docket.

Would that testimony or my representation that that was Mr. Joseph's testimony on the record, refresh your recollection as to any of the events you testified about?

A. That's a deliberate lie.

Q. Does that representation as to Joseph's testimony refresh your recollection?

A. I can't—no, no recollection, no refreshing necessary. That is a lie because I never saw these papers until August of 1972.

Q. So, in other words, in spite of what Mr. Joseph had indicated and in spite of what you told us about Mr. Joseph being a good clerk and truthful man as far as you knew, it's now your contention he perjured himself before the grand jury?

A. He certainly did;

whereas in truth and in fact the said Samuel Moore in 1968 did have knowledge of and did participate in the disposition of the aforesaid complaint, that is, the said Samuel Moore knew of the existence of the aforesaid com-

plaint in 1968, did direct Adolph Joseph to make certain writings on the back of the complaint, did in fact take the complaint from the Municipal Court for the City of Egg Harbor City, did tell Adolph Joseph that approval had been granted by the Atlantic County Prosecutor's Office to dismiss the complaint and did authorize the dismissal; contrary to the provisions of N.J.S. 2A:131-4, and against the peace of this State, the government and dignity of the same.

COUNT VI

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant on November 8, 1972, at the City of Trenton, in the County of Mercer, and within the jurisdiction of this Court, did commit willful false swearing, in the manner and form following, to wit:

1. On the day aforesaid, in the City and County aforesaid, a criminal investigation was pending before the State Grand Jury, which investigation concerned the activities of Edwin H. Helfant and Samuel Moore and divers other persons associated with them in connection with the crimes of conspiracy (N.J.S. 2A:98-1 and 2), compounding a crime (N.J.S. 2A:97-1), misconduct in office (N.J.S. 2A:85-1), and which investigation the grand jury then and there had lawful power and authority to conduct.

2. In the course of said investigation the aforesaid Edwin H. Helfant was called before the State Grand Jury and then and there was duly and regularly sworn as a witness before the State Grand Jury by the fore-

man thereof, the said Edwin H. Helfant then and there taking the oath that the evidence which he should give to the State Grand Jury should be the truth, the whole truth and nothing but the truth, and the foreman then and there having competent authority to administer such oath to the said Edwin H. Helfant in that behalf.

3. Upon the said Edwin H. Helfant being sworn, it was then and there inquired into how and under what circumstances a signature purporting to be that of William H. Hicks was placed upon a certain release, dated June 7, 1968, which discharged John Cantoni from any claim, or claims, or causes of action emanating from a disagreement or altercation that took place at the Harbor House Bar, Egg Harbor City, New Jersey, in 1968.

4. In reference to the aforementioned matter under inquiry, the said Edwin H. Helfant then and there before the State Grand Jury falsely, willfully, intentionally and knowing the same to be false, said, deposed, swore and gave in evidence testimony, that the aforementioned release was signed in his presence on June 7, 1968 by William H. Hicks, as follows:

Q. I show you State Grand Jury Exhibit No. 11.
A. Yes, sir.
Q. Do you recognize that document?
A. Yes, sir.
Q. And what is that document?
A. It's a release that I prepared.
Q. Did you dictate it?
A. I don't know if I dictated it or I told Jane to prepare a release and gave her the terms.

Q. Well, most of it is kind of formal?
A. Yes, it's a formal release.
Q. "And more particularly from any claim or claims or causes of action whatsoever, emanating from a disagreement or altercation that took place at the Harbor House Bar, Egg Harbor City, New Jersey on the day of , 1968."
Did you dictate that language?
A. Could be, or else Jane put it in there on her own. I mean, she knows how to prepare a release.
Q. She would have access to this information?
A. I would have given her the date and told her what, and she would have just prepared it.
Q. And did Hicks sign this release in your presence?
A. In my presence and in the prsence of Jane Durham (D-u-r-h-a-m).
Q. And this is the 7th day of June?
A. Whatever date is on that instrument is the date it was signed.
Q. Well, see, if the 7th day of June—
A. 7th day of June. And that's filled in by Jane.
Q. So this must have taken place at your office?
A. Yes;

whereas in truth and in fact, the said Edwin H. Helfant then and there well knew that the release was not signed in his presence on June 7, 1968, by William H. Hicks and the signature on the release which he was shown in the grand jury was a forgery; contrary to the provisions of N.J.S. 2A:131-4, and against the peace of this State, the government and dignity of the same.

Indictment

COUNT VII

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant on November 8, 1972, at the City of Trenton, in the County of Mercer, and within the jurisdiction of this Court, did commit willful false swearing, in the manner and form following, to wit:

1. Paragraphs (1) and (2) of Count VI of this indictment are realleged herein as if set forth in full.

2. Upon the said Edwin H. Helfant being sworn, it was then and there inquired whether he had affixed his signature to the back of a criminal complaint, in the case of State v. John Cantone, Docket No. C-251 for 1968, over a type line reading: "Witness as to Eugene Summerson".

3. In reference to the aforementioned matter under inquiry the said Eugene H. Helfant then and there before the State Grand Jury falsely, willfully, intentionally, and knowing the same to be false, said, deposed, swore and gave in evidence testimony, in the effect that the signature he was being questioned about was not his, as follows:

Q. I show you a signature under which is typed "Witnessed as to Eugene Summerson", and I ask you if you recognize that signature?
A. I do not, sir.
Q. Mr. Helfant, is that your signature?
A. No. This is not my signature.
Q. Are you absolutely certain of that?

Indictment

A. One hundred percent certain. On my life, that's not my signature;

whereas in truth and in fact the said Edwin H. Helfant then and there well knew that the signature on the back of the aforesaid criminal complaint over the typing "Witness as to Eugene Summerson" was his signature; contrary to the provisions of N.J.S. 2A:131-4, and against the peace of this State, the government and dignity of the same.

COUNT VIII

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant on November 8, 1972, at the City of Trenton, in the County of Mercer, and within the jurisdiction of this Court, did commit willful false swearing, in the manner and form following, to wit:

1. Paragraphs (1) and (2) of Count VI of this indictment are realleged herein as if set forth in full.

2. Upon the said Edwin H. Helfant being sworn, it was then and there inquired into if he ever had a discussion in 1968 with Richard Cantoni, also known as Babe, at the Green Lantern Motel about dropping the criminal charges against John Cantoni in return for the payment of a sum of money.

3. In reference to the aforementioned matter under inquiry, the said Edwin H. Helfant then and there before the State Grand Jury falsely, willfully, intentionally, and knowing the same to be false, said, deposed, swore and

gave in evidence testimony in the effect that he never met Richard Cantoni, also known as Babe, and never had any discussion with him about the criminal charges pending against John Cantoni, as follows:

> Q. Any discussion with Babe Cantoni about this case?
>
> A. Do not know Babe Cantoni.
>
> Q. Any discussion with a man who came to you at the Green Lantern?
>
> A. Nobody ever came to me at the Green Lantern.
>
> Q. If I were to tell you that Babe Cantoni has indicated that he came to you and discussed with you how much you wanted to drop the charges and you said $5,000.00 or Cantoni will go to jail, does that refresh your recollection?
>
> A. That would have been an untrue statement because it never happened.
>
> Q. Never happened?
>
> A. Never happened.
>
> Q. Never saw Babe Cantoni?
>
> A. Don't know Babe Cantoni.
>
> Q. Just know his name?
>
> A. Only from what Mr. Lipman told me, that he represented the vending machine company and that this is how he got into the case, that's the only time I heard the name Babe Cantoni.
>
> Q. You are absolutely certain that Babe Cantoni never came to you and asked you how much money you wanted to drop the charges?
>
> A. Absolutely certain;

whereas in truth and in fact the said Edwin H. Helfant then and there well knew that he had met with Richard

Cantoni, also known as Babe, at the Green Lantern Motel in 1968 and had discussed with him the dropping of criminal charges against John Cantoni for atrocious assault and battery in return for the payment by John Cantoni of a sum of money to Edwin H. Helfant; contrary to the provisions of N.J.S. 2A:131-4, and against the peace of this State, the government and dignity of the same.

COUNT IX

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant on November 8, 1972, at the City of Trenton, in the County of Mercer, and within the jurisdiction of this Court, did commit willful false swearing, in the manner and form following, to wit:

1. Paragraphs (1) and (2) of Count VI of this indictment are realleged herein as if set forth in full.

2. Upon the said Edwin H. Helfant being sworn, it was then and there inquired into whether Edwin H. Helfant ever met with Shelly Kravitz and discussed with him the dropping of criminal charges against John Cantoni in return for the payment of money to Edwin H. Helfant.

3. In reference to the aforementioned matter under inquiry, the said Edwin H. Helfant then and there before the State Grand Jury falsely, willfully, intentionally and knowing the same to be false, said, deposed, swore and gave in evidence testimony, in the effect that he never met with Shelly Kravitz and had discussions with him about the criminal case involving John Cantoni, as follows:

Q. Do you know a man by the name of Shelly Kravitz?

A. Yes, sir.

Q. How long have you known Kravitz?

A. I would say about seven or eight years.

Q. Did you ever have any discussion with Shelly Kravitz about this case?

A. Absolutely not.

Q. A day or two after that beating or this injury to Mr. Hicks, did you call Mr. Kravitz and tell him you wanted to see him in your office?

A. Absolutely not.

Q. When Kravitz first came to see you in your office, did you tell Kravitz that Cantoni had to get some money up or you would go to quote "Personally prosecute the case"?

A. Kravitz never came to my office. And I never discussed this case with him.

Q. Did you ever tell Shelly Kravitz or anybody else you were going to "personally prosecute this case", before Judge Moore, unless Cantoni came up with the money?

A. Not alone didn't I say that, it wouldn't be possible.

Q. I don't particularly care whether or not that was possible. Did you or did you not say that?

A. I never said any such thing, never discussed this case with Shelly Kravitz at all.

Q. Did you tell Shelly Kravitz in a subsequent conversation, unless Cantoni came up with the money you were going to see he was going to be put in jail?

A. I never said any such thing.

Q. That would have been extortion?

A. I don't know about extortion, it would have been an improper statement.

Q. It would be compounding a felony, wouldn't it?

A. Most likely;

whereas in truth and in fact the said Edwin H. Helfant then and there well knew that he did meet in 1968 with Shelly Kravitz and had discussions with him about the dropping of criminal charges against John Cantoni for atrocious assault and battery against William H. Hicks in return for the payment of a sum of money; contrary to the provisions of N.J.S. 2A:131-4, and against the peace of this State, the government and dignity of the same.

EVAN WILLIAM JAHOS,
Assistant Attorney General and
Director of the Division of
Criminal Justice

A TRUE BILL:

CARL F. PENNIPEDE,
Foreman

Notice of Motion to Dismiss Indictment

(Filed—March 8, 1973)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—CRIMINAL
MERCER COUNTY

INDICTMENT No. SGJ 10-72-10
Criminal Action

THE STATE OF NEW JERSEY

vs.

EDWIN H. HELFANT, SAMUEL MOORE,

Defendants.

To: JOSEPH A. HAYDEN, JR., Deputy Attorney General
Organized Crime and Special Prosecutions Division
New Jersey Police Headquarters
Box 68
West Trenton, N. J. 08625

THE HONORABLE ARTHUR A. SALVATORE
Mercer County Court House
Trenton, N. J. 08625

PLEASE TAKE NOTICE that the undersigned attorney for the defendant will make application before the Superior Court of New Jersey, Law Division (Criminal), Mercer

Notice of Motion to Dismiss Indictment

County, at the Court House in Mercer County on Friday, March 16, 1973 at 9:00 a.m. in the forenoon or as soon thereafter as the matter can be heard for Orders from the Court as follows:

1. Dismissing all counts of the indictment because of the misconduct of the Grand Jury and/or the Deputy Attorney General in the presentation of evidence to the Grand Jury and in the return of the within indictment, including the involvement of the Deputy Attorney General with the Supreme Court and in releasing information to the Supreme Court concerning the defendant, which matters emanated from the investigation being carried out by the Grand Jury and the Deputy Attorney General.

2. Dismissing Counts 1, 2 and 3 of the indictment because of the fact that there has been no compounding of a crime since at the time of the alleged compounding, the basic offense was viable and indictable.

3. To dismiss Counts 6, 7, 8 and 9 of false swearing because of the improper conduct of the Deputy Attorney General in not fully advising the jurors of the criminal records of State's witnesses whose credibility was directly involved, and of withholding this information from the Grand Jury, and because of the improper actions of the Deputy Attorney General in presenting contradictory statements to the Grand Jury and not explaining their contradiction to the Grand Jurors and because of the additional reasons stated and to be discovered as pointed out in Point I and hereafter.

4. At the same time and place the defendants will seek to obtain an Order establishing their right at a specified

time and place to depose the Deputy Attorney General, Joseph A. Hayden, Jr., in this matter in order that proper appellate review might be made to ascertain just what documents and information was supplied by Joseph A. Hayden, Jr. to the Justices of the Supreme Court or any one of them prior to the conference of Edwin Helfant with the Justices on November 8, 1972 and what information Deputy Attorney General Joseph A. Haydlen, Jr. received from the Supreme Court in connection with Edwin Helfant both before and after the conference.

5. At the same time and place the defendant will seek to depose Joseph A. Hayden, Jr. in order to establish possible misconduct on his part in connection with the change of testimony before the Grand Jury supplied by Eugene Summerson, Shelley Kravitz and Willliam Hicks before the Grand Jury herein.

6. Defendants will seek to renew their mottion to dismiss the indictment based on violation of the defendants' constitutional rights under the 4th, 5th and 6th Amendments after these depositions.

7. At the same time and place application will be made to renew the request for separate trials of the defendants Edwin H. Helfant and Samuel Moore on the basis that representations made by the Deputy Attorney General to the Court at the previous motion, as borne out by the transcript of the Grand Jury proceedings which were subsequently received, to the end that there was only minor conflict in their positions, was absolutely untrrue.

8. To dismiss Count 3 of the Indictment charging aiding and abetting the compounding of a crime because the principal offense was not committed.

9. At the same time and place, motion will be made to dismiss all counts of the indictment because the Supreme Court has been acquainted with the factual matters involved in the Grand Jury investigation during its pendency, either directly or indirectly by the Deputy Attorney General conducting the investigation.

Thus, irreparable taint and fatal prejudice have been visited upon the entire proceedings and all counts of the indictment involved.

10. Please take notice that at the same time and place defendant Helfant will apply to the Court for an Order directing the Deputy Attorney General Joseph A. Hayden, Jr. to submit to a lie detector test conducted by a qualified and independent lie detector operator at a time and place and under conditions to be fixed by the Court, to ascertain the truth of the testimony to be sought in connection with all confrontations of the Deputy Attorney General with the Supreme Court or any member thereof in connection with the investigation involving the defendant Edwin H. Helfant.

11. At the same time and place, application will be made to take the deposition of the foreman of the Grand Jury in order to further substantiate the claims of misconduct made herein, at a time and place and under conditions to be fixed by the Court.

12. At the same time and place application will be made to dismiss all counts of the indictment and to renew the motion heretofore made for change of venue based on the attached newspaper reports of December 7, 1972 which appeared all over the State of New Jersey and because

Notice of Motion to Dismiss Indictment

of the statements made in the attached transcript which were made in open Court.

Attached to this Notice of Motion and incorporated herein by this reference thereto are applicable exhibits.

MARVIN D. PERSKIE, ESQUIRE and
PATRICK T. MCGAHN, JR., ESQUIRE,
Co-Counsel for defendant Helfant
By: Marvin D. Perskie

DATED: March 8, 1973

Order of Judge Salvatore Denying Motion to Dismiss the Indictment

(Filed—April 6, 1973)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION (CRIMINAL)
MERCER COUNTY

INDICTMENT No. SGJ 10-72-10

THE STATE OF NEW JERSEY

vs.

EDWIN H. HELFANT, SAMUEL MOORE,

Defendants.

This matter having been opened before the Court by Marvin D. Perskie and Patrick T. McGahn, Jr., Esquires, attorneys for the defendant Edwin H. Helfant on motion to dismiss the indictments, and coming on to be heard in the presence of Edward C. Laird, Deputy Attorney General;

It is in the case of the motion dated March 8, 1973, on this 5th day of April, 1973 ORDERED AND ADJUDGED as follows:

1. Paragraphs 1, 2, 3, 4, and 5 are herewith denied.
2. Action on Paragraph 6 is denied.

Order of Judge Salvatore Denying Motion to Dismiss the Indictment

3. Paragraph 7 is denied, with reservation to renew.

4. Paragraph 8 is withheld pending further proceedings.

5. Paragraph 9 is denied.

6. Paragraphs 10, 11 and 12 are denied.

IT IS FURTHER ORDERED AND ADJUDGED that the action of the Court on the application to amend the previous motion to dismiss the indictments dated March 15, 1973 is withheld, pending further Court proceedings.

ARTHUR A. SALVATORE
J.S.C.

I consent to the form of the above Order

Edward C. Laird,
Deputy Attorney General

Notice of Motion for Leave to Appeal in Appellate Division

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO.

THE STATE OF NEW JERSEY

vs.

EDWIN H. HELFANT,

Defendant-Appellant

To: THE HONORABLE JUDGES OF THE APPELLATE DIVISION
Mercer County Court House
Trenton, N. J. 08607

EDWARD C. LAIRD, DEPUTY ATTORNEY GENERAL
Organized Crime & Special Prosecutions Section
New Jersey State Police Headquarters
Box 68
West Trenton, N.J. 08625

PLEASE TAKE NOTICE that the undersigned attorneys for the defendant Edwin H. Helfant move the Superior Court of New Jersey, Appellate Division, to grant the defendant application for leave to appeal to the Appellate Division in accordance with the provisions of R. 2:2-4, from

Notice of Motion for Leave to Appeal in Appellate Division

an interlocutory order entered by Judge Arthur Salvatore in the Superior Court of New Jersey, Mercer County, Criminal Law Division, dated April 5, 1973 denying inter alia, Motion of March 8, 1973 to dismiss counts of the indictment because of the misconduct of the Grand Jury and/or the Deputy Attorney General in connection with this indictment and denying Motion to dismiss the indictment because of the involvement of the Supreme Court in connection with the factual matters under investigation before the State Grand Jury and denial of Motion to dismiss the indictment and renewing the Motion for change of venue because of prejudicial publicity and Order dismissing Motion for a severance of trials in the case of the defendant Moore and the defendant Helfant reserving right to raise these and other matters in the event of an appeal from Final Judgment.

MARVIN D. PERSKIE, ESQUIRE
PATRICK T. MCGAHN, JR., ESQ.
Co-Counsel for Defendant
By: Marvin D. Perskie, Attorney
for Defendant-Appellant

Orders of Appellate Division Denying Leave to Appeal

(Filed—May 4, 1973)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. AM-333-72

Motion No. M-1345-72

Before Part D

Judges Kolovsky
Matthews
Crahay

STATE OF NEW JERSEY

vs.

EDWIN H. HELFANT

Moving Papers Filed—April 16, 1973

Answering Papers Filed—April 27, 1973

Date Submitted to Court—April 27, 1973

Date Decided—May 3, 1973

ORDER

This matter having been duly presented to the Court, it is hereby ORDERED as follows:

Orders of Appellate Division Denying Leave to Appeal

Motion for Leave to Appeal—Denied.

For the Court:

s/ HAROLD KOLOVSKY
P.J.A.D.

Witness, the Honorable Harold Kolovsky, Presiding Judge of Part D, Superior Court of New Jersey, Appellate Division, this 3rd day of May 1973.

MORTIMER G. NEWMAN, JR.
Clerk of the Superior Court

(Filed—May 17, 1973)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. AM-340-72

Motion No. M-1445-72

Before Part D

Judges Kolovsky
Matthews
Crahay

STATE OF NEW JERSEY

vs.

EDWIN H. HELFANT

Orders of Appellate Division Denying Leave to Appeal

Moving Papers Filed—April 23, 1973

Answering Papers Filed—May 1, 1973

Date Submitted to Court—May 14, 1973

Date Decided—May 16, 1973

ORDER

This matter having been duly presented to the Court, it is hereby ORDERED as follows:

Motion for Leave to Appeal—Denied.

For the Court:

s/ HAROLD KOLOVSKY
P.J.A.D.

Witness, the Honorable Harold Kolovsky, Presiding Judge of Part D, Superior Court of New Jersey, Appellate Division, this 16th day of May 1973.

MORTIMER G. NEWMAN, JR.
Clerk of the Superior Court

Notice of Motion for Leave to Appeal and for Certification

SUPREME COURT OF NEW JERSEY

Re: New Jersey Superior Court
Appellate Division Numbers
AM-333-72 and AM-340-72

Criminal Action

STATE OF NEW JERSEY,

vs.

EDWIN H. HELFANT,

Defendant.

To: *The Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey*

The Honorable Arthur Salvatore
Mercer County Court House
Trenton, N. J. 08607

Edward C. Laird, Deputy Attorney General
Organized Crime and Special Prosecutions Section
New Jersey State Police Headquarters, Box 68
West Trenton, New Jersey 08625

PLEASE TAKE NOTICE that the undersigned attorneys for the defendant, Edwin H. Helfant, herewith appeal to the Supreme Court of the State of New Jersey in accordance

Notice of Motion for Leave to Appeal and for Certification

with the provisions of R. 2:2-2(b) and (c) and R. 2:12-1 for Leave to Appeal Two Interlocutory Orders of the Trial Court presently before the Superior Court, Appellate Division on application for Leave to Appeal and further for certification of the Supreme Court to the Appellate Division of these Appeals presently pending in that Court and unheard as of this date. Attached hereto is Brief in support of this application which is an emergent matter and which involves substantial and imminent irreparable injury to the defendant.

MARVIN D. PERSKIE, ESQUIRE
PATRICK T. MCGAHN JR., ESQ.
Co-Counsel of Defendant
By: MARVIN D. PERSKIE
Attorney for Defendant

Orders of New Jersey Supreme Court Denying Motion for Leave to Appeal and for Certification

(Filed—May 2, 1973)

SUPREME COURT OF NEW JERSEY

M-324 SEPTEMBER TERM 1972

STATE OF NEW JERSEY,

Plaintiff-Movant,

vs.

EDWIN H. HELFANT,

Defendant-Petitioner.

This matter having been duly presented to the Court, it is Ordered that the motion to dismiss petition for certification is granted.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 2nd day of May, 1973.

FLORENCE R. PESKOE

Acting Clerk

Orders of New Jersey Supreme Court Denying Motion for Leave to Appeal and for Certification

(Filed—May 2, 1973)

SUPREME COURT OF NEW JERSEY

M-323 SEPTEMBER TERM 1972

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

EDWIN H. HELFANT,

Defendant-Movant.

This matter having been duly presented to the Court, it is Ordered that the motion for leave to appeal is denied.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 2nd day of May, 1973.

FLORENCE R. PESKOE
Acting Clerk

Orders of New Jersey Supreme Court Demying Motion for Leave to Appeal and for Certificaation

(Filed—May 2, 1973)

SUPREME COURT OF NEW JERSEY

C-416 SEPTEMBER TERM 1972

STATE OF NEW JERSEY,

Plaintifff-Respondent,

vs.

EDWIN H. HELFANT,

Defendaint-Petitioner.

To Appellate Division, Superior:

A petition for certification having been submitted to this Court, and the Court having considered tthe same,

It is hereupon Ordered that the petition for certification is denied.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, on the 2nd day of May, 1973.

FLORENCIE R. PESKOE

Acting Clerk

Orders of New Jersey Supreme Court Denying Motion for Leave to Appeal and for Certification

(Filed—May 2, 1973)

SUPREME COURT OF NEW JERSEY

M-325 SEPTEMBER TERM 1972

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

EDWIN H. HELFANT,

Defendant-Movant.

This matter having been duly presented to the Court, it is Ordered that the motion for leave to appeal and for certification is denied.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 2nd day of May, 1973.

FLORENCE R. PESKOE
Acting Clerk

Verified Complaint, dated May 2, 1973

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL NO.

EDWIN H. HELFANT,

Plaintiff,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Defendants.

The plaintiff, Edwin H. Helfant, residing at Green Lantern Motel, Somers Point, Atlantic County, State of New Jersey, by way of complaint says:

1. Plaintiff is a citizen of the United States and resides in Atlantic County, New Jersey. All defendants herein are residents of the State of New Jersey.

2. Defendants, George F. Kugler, Attorney General of the State of New Jersey, Joseph A. Hayden, Jr., Deputy

Verified Complaint, dated May 2, 1973

Attorney General of the State of New Jersey, Chief Justice Joseph A. Weintraub, Associate Justices Nathan L. Jacobs, Haydn Proctor, Frederick W. Hall, Worrall F. Mountain, Jr., Mark A. Sullivan, of the Supreme Court of New Jersey and The State of New Jersey, deprived plaintiff of privileges and immunities guaranteed to every citizen of the United States, including plaintiff, by Amendment 5 and Section 1 of Amendment 14 of the Constitution of the United States, and by reason thereof, this Court has jurisdiction under 42 U.S.C.A., Section 1983 and 28 U.S.C.A. Section 1343.

3. The plaintiff herein, Edwin H. Helfant, is a member of the Bar of the State of New Jersey and a former municipal court judge.

4. Some time before October 18, 1972 the State of New Jersey began a State Grand Jury investigation, inter alia, into an alleged illegal withdrawal of an indictable criminal charge of atrocious assault and battery arising out of an incident occurring on March 17, 1968 in Egg Harbor City, Atlantic County, New Jersey, in which the defendant was alleged to have participated. This State Grand Jury investigation was personally conducted by the defendant, Joseph A. Hayden, Jr., Deputy Attorney General of the State of New Jersey.

5. The plaintiff, Edwin H. Helfant, was a designated target of the State Grand Jury investigation and was so advised by the Deputy Attorney General aforedesignated, who was handling the matter, when he first appeared before the State Grand Jury on October 18, 1972 at which time he resorted to his privilege under the Fifth Amendment of the U. S. Constitution and refused to testify. See attached exhibit.

6. He was subsequently subpoenaed to appear again before the State Grand Jury on November 8, 1972. The State Grand Jury at that time sat at the State House Annex, Trenton, New Jersey at the other end of the hall from the private chambers of the Chief Justice and Justices of the New Jersey Supreme Court.

7. On November 6, the Administrative Director of the Courts of New Jersey called the law offices of the plaintiff in Atlantic City, New Jersey. About 3:30 in the afternoon, after being given the message of this call, plaintiff returned the call to the Administrative Director. He was directed by the Administrative Director to appear before the Supreme Court in their private chambers at 10 mintues before 10 on November 8, 1972. The plaintiff advised the Administrative Director that at 10 o'clock he had to appear before the Grand Jury. The Administrative Director advised the plaintiff that the Supreme Court was well aware of this fact and that he was still to be before the Supreme Court. No reason was given for this appearance and no other direction to appear, other than the telephone message of the Administrative Director made to the plaintiff directly, and to his office. At or about the designated time on November 8, 1972 the plaintiff went into the chambers of the Supreme Court at the State House, Trenton, New Jersey. He was questioned by the Chief Justice and Associate Justice Sullivan in the presence of the Court. The Chief Justice inquired of the defendant whether he thought a Judge should invoke the Fifth Amendment. Justice Sullivan asked what the plaintiff's feelings were about a Judge sitting in judgment of other people while he himself was invoking the Fifth Amendment before a Grand Jury. He also asked plaintiff if he had sat as a Judge since invoking the Fifth Amend-

ment. Chief Justice Weintraub and another Justice also asked of plaintiff some questions about his son's Bar Mitzvah, which matters were contemporaneously being considered by the State Grand Jury, including seating arrangements and who paid for the liquor. These questions also concerned an Abe Schusterman, who was a State's witness against the plaintiff and who had appeared before the State Grand Jury. The Chief Justice also questioned plaintiff about Atlantic County Judge Thomas Rauffenbart and about an ice-making machine that was involved in an alleged pay-off in a criminal case involving Abe Schusterman, all of which matters were then being considered and investigated by the State Grand Jury which was being conducted by the defendant Joseph A. Hayden, Jr. under the direction of Attorney General George F. Kugler.

The questions posed to the plaintiff by the Justices of the Supreme Court were in connection with matters then being considered by the State Grand Jury. There had been no public release of these matters, particularly the Bar Mitzvah, seating arrangements thereat, arrangements for the liquor and the gift of an ice machine. These matters had to be a portion of the raw evidence then being considered by the State Grand Jury and released and given to the Supreme Court during the pendency of the Grand Jury proceedings by defendant Deputy Attorney General Joseph A. Hayden, Jr., who was conducting the Grand Jury investigation.

After the plaintiff left the Supreme Court chambers, he was in a state of confusion and bewilderment and had to go immediately before the State Grand Jury. On a previous occasion before the State Grand Jury he had encountered three State's witnesses who were then in State

and County Prisons serving sentences for various crimes, two of said witnesses having long records. He had been advised by Detective William Sullivan of the New Jersey State Police, who was assisting Deputy Attorney General Hayden in the investigation, of the thrust of some of the testimony of these witnesses, which testimony if believed would incriminate the plaintiff. He was therefore in a position that if he testified at variance with these witnesses, even though it were the truth, the State Grand Jury would be faced with inconsistent statements and could indict him for false swearing, as he was. He was faced with the proposition that if he agreed with the testimony of these witnesses, he could be indicted for conspiracy, as he was. Knowing of these witnesses, i.e., John Cantoni, Shelly Kravitz and Abe Schusterman, their reputations and backgrounds and long records of convictions, plaintiff was aware that they had to have testified as a result of promises and commitments made to them in connection with shortening their prison stays, which facts were later admitted by the Deputy Attorney General Joseph A. Hayden, Jr. in connection with answers made to discovery wherein he admitted that recommendations of leniency and dropping of charges had been made in the cases of all three men.

8. As a result of these questions, the plaintiff, whose previous counsel-advised intentions and will were completely discarded and overcome and who was quite emotionally upset by the confrontation, indicated to the Justices that he would indeed waive his Fifth Amendment privilege and testify in full before the State Grand Jury, fearing not only the loss of Judgeship, but for his accreditation as a member of the bar as well.

9. Immediately after the plaintiff left the chambers of the New Jersey Supreme Court, Deputy Attorney General Joseph A. Hayden, Jr., who was then conducting the State Grand Jury investigation of which plaintiff was a target, went into the Supreme Court chambers and stayed there for a short period of time and then left. It is believed he preceded the plaintiff into the chambers and that he had previous contact about plaintiff with the Supreme Court about the pending investigation.

10. To date, the Deputy Attorney General has not indicated what was the purpose for his immediately visiting the Supreme Court chambers after the plaintiff had left there, but on being confronted with the facts in open court, has resorted to an illusory "right of privacy" and an alleged right of interdepartment privilege and communication which is not only non-existent but violative of the basic constitutional concept of separation of power. (See attached exhibits.) Nor has defendant denied his communications with the Supreme Court about plaintiff during a pending Grand Jury investigation, nor his revelation of raw Grand Jury evidence about plaintiff to them and his violating the secrecy of the Grand Jury, but has sought to justify same.

11. On January 17, 1973 an indictment was returned by the same State Grand Jury aforedesignated against the plaintiff herein, charging him with conspiracy, obstruction of justice, aiding and abetting the compounding of a crime, and *four counts of false swearing*.

12. On April 6, 1973 the Trial Court entered two orders denying plaintiff's previously made motions to dismiss the indictments and counts thereof, based upon the intrusion of the Deputy Attorney General into the Supreme Court

chambers, and his acquaintance of the New Jersey Supreme Court with the factual matters involved in a pending State Grand Jury investigation and the resultant coercive actions of both the Deputy Attorney General and the Supreme Court which deprived plaintiff of the voluntary exercise of his Fifth Amendment rights.

13. The plaintiff then filed two motions for leave to appeal the orders of the Trial Court aforesaid with the Appellate Division of New Jersey on April 16, 1973 and April 23, 1973 and a motion for leave to appeal these unheard motions and for certification from the Supreme Court on April 26, 1973.

14. As a result of the intrusion by the Deputy Attorney General and the disclosure to the Supreme Court of factual matters involved in a Grand Jury investigation during pendency of that investigation, and because of the intrusion of the New Jersey Supreme Court into the Grand Jury investigation and the communication between the Supreme Court of New Jersey and the Deputy Attorney General conducting the Grand Jury investigation, the plaintiff herein is made to suffer great, immediate, substantial and irreparable harm in that he must attempt to defend criminal charges brought in a State in which there has been prejudicial collusion directly affecting plaintiff, whether intentional or inadvertent between the Judicial and Executive branches of the New Jersey State government. Plaintiff is being made to defend criminal charges which have been obtained, inter alia, as a result of that collusion, and the deprivation of plaintiff's constitutional rights by not too subtle cooperative coercion on the part of the defendants. Furthermore, in the event of his conviction upon any one of the charges presently pend-

ing against him, plaintiff's only recourse would be review by the State Courts and ultimately the New Jersey Supreme Court, which Court he has alleged has been involved in the prosecution of the charges against him. Thus, any defense by plaintiff in other charges in State Court would be totally futile, because he would have to defend charges at the trial level, with the Trial Court fully cognizant of the "interest" of the Supreme Court in the charges, and could only seek review of his pretrial motions and trial motions and appeals in the same court that he alleges has unlawfully injected itself into the prosecution of the charges against him and unlawfully deprived him of his constitutional rights. The conclusion must be that the State is engaging in a bad faith prosecution of the plaintiff herein, and for this reason he seeks a permanent injunction against the further prosecution of the State proceedings under 28 U.C.A., Section 2283.

15. The plaintiff was arraigned on the Indictment SGJ 10-72-10 in this case on February 2, 1973. Trial on this indictment has been preemptorily set for May 14, 1973 and Trial Judge Arthur Salvatore has refused to grant any continuance for trial.

16. The State of New Jersey is made a party hereto so that complete relief may be afforded.

17. The plaintiff has been denied due process of law and fundamental fairness referable to the action of the defendants herein.

18. Just today (May 2, 1973) there was received from the Deputy Attorney General a motion returnable on May 11, 1973 in Trenton, completely reversing his posi-

tion heretofore made during preliminary motions in this case with regard to the introduction of testimony of the co-defendant of the plaintiff in the criminal action in the State of New Jersey.

WHEREFORE, plaintiff demands judgment as follows:

a) A temporary and permanent injunction restraining defendants from further prosecuting or proceeding on any charges arising out of and including Indictment No. SGJ 10-72-10;

b) For a temporary restraining order restraining the defendants from prosecuting said charges insofar as they apply to plaintiff until this matter can be heard and determined, and

c) For any other relief the Court may deem just and fair.

MARVIN D. PERSKIE, ESQUIRE and
PATRICK T. MCGAHN, JR., ESQUIRE
Co-Counsel for Plaintiff
By: MARVIN D. PERSKIE

Dated: May 2, 1973

(Verified by Edwin H. Helfant on April 27, 1973.)

Affidavits Annexed to Complaint

STATE OF NEW JERSEY,
COUNTY OF ATLANTIC, } ss.:

EDWIN H. HELFANT, of full age, and being duly sworn according to law, upon his oath deposes and says:

1. On Wednesday, October 18, 1972, I appeared in front of the State Grand Jury in Trenton, and to the best of my recollection, I invoked my constitutional rights under the Fifth Amendment to four or five questions posed to me by the Attorney General. This was after a hearing before Judge Kingfield wherein my intended position to invoke my privilege was made clear to the Deputy Attorney General and the Court.

2. It was indicated that I would have to come back for another session.

3. On November 6, 1972, a call was received at my office at approximately 3:30 p.m. from the Administrative Director's Office with the information that my appearance was required in the Supreme Court Chambers on Wednesday, November 8th, at 9:50 a.m. I had called my office from Camden County and received this information, and immediately called Mr. McConnell, the Administrative Director of the Courts, and informed him that I had previously been served with a subpoena to appear before the State Grand Jury in Trenton at 10:00 a.m. on the same date. Mr. McConnell said that he was aware of this, and I should still be at the Supreme Court Clerk's Office at 9:50 a.m. on Wednesday, the 8th.

4. Accordingly, on Wednesday, the 8th, I proceeded to Trenton and arrived at the Supreme Court Clerk's Office at about 9:30 or 9:35 a.m. I was told to wait in the Clerk's office. At approximately 9:55 a.m. I was requested to proceed to the Supreme Court Chambers where the Supreme Court Justices were in conference. When I arrived, the Chief Justice asked me if I though a Judge should invoke the Fifth Amendment. I replied that I did not. I attempted to explain to the Chief Justice why I had done so in the past, but he did not want to get into the merits of the matter, and rightfully so. Mr. Justice Sullivan asked me if I sat in the municipal court since the time of my invoking the Fifth Amendment before the State Grand Jury, and I told him I sat on one occasion only. He then asked me what my feelings were about a Judge sitting in judgment of other people while he himself invokes the Fifth Amendment before a Grand Jury. I did not explain my reasons for doing so and indicated I would then appear before the Grand Jury that morning in Room 438, which was just down the hall from the Supreme Court Chambers, and would testify without invoking the Fifth Amendment.

5. When the subpoena for the November 8th State Grand Jury session had been served upon me by Detective Sullivan, and after I had invoked the Fifth Amendment on October 18th, Detective Sullivan told me I was going to receive immunity and be made a State's witness. I made no comment about same. Detective Sullivan asked me if I had ever talked to or met with Shelly Kravitz, one of the State witnesses in this case, and I answered in the negative. He asked me if I ever talked to Richard Cantone. I told him I did not know him and never talked to

him, and he asked me various other questions about the Hicks-Cantone matter. He asked me to verify my signatures on some photocopies of my checks that were signed by me.

6. To the best of my recollection, I was never advised when I appeared before the Grand Jury on November 8th that I was the target of a false swearing charge.

7. The Attorney General was instrumental in inducing me to waive my constitutional rights. Part of the reason I waived my constitutional rights was because of the fact that the Attorney General required me to appear before the Grand Jury on November 8th on the representation that the investigation by the Grand Jury pertained to the obstruction of justice, when in fact he knew and had already planned to have me indicted for false swearing, knowing from their past investigation and statements made by me prior to my appearance before the Grand Jury what my testimony would be as to what later developed to be the four counts of false swearing.

8. The basis for these counts of false swearing were set by the State's witnesses, two of whom are presently in prison, and were in prison at the time they testified before the Grand Jury. When I testified, I assumed I was waiving my constitutional rights with regard to being a target of the jury in connection with the obstruction of justice. The Attorney General already had the testimony of Kravitz and Cantone, and their answers to the questions that were then posed to me were made the basis of at least two of the false swearing charges.

9. I feel that the Attorney General was usiing the Grand Jury for the purpose of entrapping and indicting me, knowing full well as a lawyer and a judge, I would appear and testify to the questions posed in the false swearing charges, when they already had the testimony of the various central points of Kravitz and Cantone.

10. I cannot say that the Supreme Court in any way directed me to testify, nor did they in any way indicate to me what the consequences would be if I continued to stand by the Fifth Amendment. However, from the very fact that I was summoned there, and from the comments of the Chief Justice and Mr. Justice Sullivam, I was concerned that in the event I concluded I should not testify the Supreme Court might have taken some action against me because of my refusal.

11. The co-defendant, Samuel Moore, did not appear at the time scheduled, but followed me into the Supreme Court Chambers by about twenty minutes to one-half hour, as I was standing in the corridor in front of the Grand Jury room and saw him enter.

12. When I left the Supreme Court Chambers, Deputy Attorney General Hayden entered, and came out after a brief interval. Again, when Samuel Moore left the Supreme Court Chambers, Deputy Attorney General Hayden entered, and emerged after a brief period of time.

EDWIN H. HELFANT

(Sworn to February 2, 1973.)

STATE OF NEW JERSEY,
COUNTY OF ATLANTIC, } ss.:

EDWIN H. HELFANT, of full age, duly sworn according to law, upon his oath deposes and says:

1. On November 8, 1972, I appeared before the Justices of the Supreme Court of New Jersey in their chambers. Chief Justice Weintraub and Mr. Justice Sullivan asked me my thoughts concerning whether a municipal court judge should invoke the Fifth Amendment. (See my Affidavit of February 2, 1973). Then the Chief Justice asked me some questions about my son's Bar Mitzvah party. I can recall that the Chief Justice asked the following questions, among others:

a. Were Abe Schusterman and his wife invited guests?

b. Where were Mr. and Mrs. Schusterman seated in the room?

c. Where was Judge Ruffenbart seated?

The Chief Justice then asked me some questions about a certain ice making machine.

2. Neither the Chief Justice nor any of the Associate Justices had any notes or memoranda from which they were questioning me, but there was a closed folder of some sort on the table in front of the Chief Justice.

EDWIN H. HELFANT

(Sworn to March 6, 1973.)

Oral Testimony before Judge Kitchen

UNITED STATES DISTRICT COURT

District of New Jersey

No. 607-73

Testimony of:

Patrick T. McGahn Jr., and Edwin H. Helfant

Before: Hon. John J. Kitchen, U.S.D.J.

Dated May 9, 1973, Camden, New Jersey

(2)* The Court: Gentlemen, this is a return day for a motion in the matter of Edwin H. Helfant versus Kugler and others. Gentlemen, what is your intention as far as procedure is concerned? I have read your briefs. I read your affidavits. I don't need those repeated. I will be glad to hear anything in addition to that, that you would care to present; but don't repeat those, please. Who is going to speak for the plaintiff?

Mr. Perskie: I am Marvin D. Perskie of the firm of Perskie and Callinan, 3311 New Jersey Avenue, Wildwood, New Jersey, will speak for the plaintiff.

The Court: All right. You may proceed.

Mr. Perskie: I am also assisted by co-counsel, Patrick T. McGahn of Atlantic City, who is co-counsel, who is present at counsel table.

The Court: You may proceed, Mr. Perskie.

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* Numerals in parenthesis refer to each new page of the stenographic transcript.

Oral Testimony before Judge Kitchen

Mr. Perskie: If the Court please, we are prepared to introduce oral testimony if the Court will entertain it at this time. I have spoken to the Attorney General and he apparently is not prepared to proceed with (3) oral testimony.

The Court: All right. You may proceed with whatever you have.

Mr. Perskie: I would also like the right to reserve argument to respond to the brief of the Deputy Attorney General which I received at 3:15 yesterday, was delivered to me personally in Wildwood.

The Court: Mine was received about the same time.

Mr. Perskie: Mr. McGahn.

PATRICK T. MCGAHN, being first duly sworn, testified as follows:

Direct examination by Mr. Perskie:

Q. Mr. McGahn, you are licensed member of the Bar of the State of New Jersey; is that correct? A. Yes, sir.

Q. How long have you been a practicing attorney? A. Since 1959.

Q. And do you hold any other officer positions in the State of New Jersey? A. Yes, sir. I am District Supervisor for the New Jersey Transfer Inheritance Tax for the County of Atlantic, a position which I held for 16 years.

(4) Q. Directing your attention to October 18, 1972, did you at that time represent one Edwin H. Helfant, the plaintiff in this matter? A. Yes, sir.

Oral Testimony before Judge Kitchen

Q. And on October the 18th, 1972, where did your representation take you at that time; where were you? A. Took me to the State House Annex in Trenton, New Jersey in response to a subpoena that was issued to Mr. Helfant to appear before the Statewide Grand Jury.

Q. Did you appear with him at that time? A. Yes, sir. I appeared at the State House Annex in Trenton on that date at approximately 9:45 a.m. on the Fourth Floor of that Building.

Q. Who was conducting the Grand Jury proceeding to your knowledge at that time? A. The Attorney General's Office.

Q. What particular Deputy? A. Joseph Hayden.

Q. Do you know Mr. Hayden? A. Yes, sir, I do.

Q. And to your knowledge was he conducting the Grand Jury proceedings that were going on? A. Yes, sir, he and other members of the Attorney General's Staff.

Q. Now did Mr. Helfant in response to that subpoena (5) voluntarily enter the Grand Jury Room? A. No, sir, he did not.

Q. What transpired when you were at that hearing? A. Upon arriving in the morning I informed Mr. Hayden that Mr. Helfant would invoke his Fifth Amendment rights and that he would not testify. I went one step further. I advised Mr. Helfant not to even go into the Grand Jury Room. Conversation continued over that. During the course of the day Mr. Hayden called many other witnesses and at approximately 3:45, he asked me again whether or not Mr. Helfant would go into the Grand Jury Room. I told him we would invoke the Fifth and that I would not even let Mr. Helfant walk into the Grand Jury Room to invoke the Fifth because I felt under the Sarcone Case, he didn't even have to show himself—viewing himself in front of the witnesses might even prejudice himself as to the Fifth Amendment.

Q. Now, was there a Court hearing that transpired over this situation? A. As a result of that, Mr. Hayden, I believe, called Judge Kingfield and set up a hearing at approximately five minutes after four over in the Courthouse in Trenton.

Q. Now to conserve time, Mr. McGahn, you have read the complaint in this matter and the attachments thereto, have you not? A. Yes, sir.

(6) Q. And attached to the complaint is a transcription of the proceedings before Judge Kingfield? A. Yes, sir.

Q. Is that a true and accurate and complete transcription of what went on before Judge Kingfield on that date? A. Yes, sir, it is.

Q. Now after the hearing before Judge Kingfield— A. I might add one other thing, Mr. Perskie. Prior to the hearing both Mr. Hayden and I went into Judge Kingfield's Chambers at which time both of us presented our sides of the matter and I asked Judge Kingfield at that time for a delay of the matter so that I could further review the matter as to whether or not the Fifth Amendment went so far as to not have a witness even go into the Grand Jury Room. He said that since we couldn't agree, Mr. Hayden and I, that we would then go out into open Court and put it all on the record.

Q. Now after the hearing terminated, what action did you take next? A. I went back, it was approximately five minutes of five on that date; I went back to the State House Annex and I asked Mr. Hayden if he would accompany me to, I believe, the Supreme Court, Office of the Supreme Court—yes, in fact, it was the Supreme Court. I attempted to call Judge Leonard of the Appellate Division, who is in our area in Atlantic County. I couldn't locate him. I looked at the Lawyers (7) Diary and found

that Judge Matthews was the closest one to South Jersey. So, I caught Judge Matthews before he left his Chambers. Mr. Hayden and I both presented our arguments to Judge Matthews over the telephone at which time I requested a stay and it was denied by Judge Matthews. I then attempted to reach Justice Weintraub to no avail and then Mr. Helfant had no alternative at that time but to go in before the Grand Jury and invoke his Fifth Amendment rights. Now Mr. Hayden, prior to Mr. Helfant going in, said that he would ask him certain specific questions and he outlined what those questions were, and Judge Helfant indicated he would take the Fifth Amendment to each of the questions. Judge Helfant then proceeded from the Supreme Court Chambers to around the corner and down the hall to where the Grand Jury was waiting and at approximately 5:15 or 5:30, he went into the Grand Jury Room and emerged about five to ten minutes later.

Q. Now was there any conversation that took place in your presence either with you and Mr. Hayden or with Mr. Hayden and Mr. Helfant when you were present after this session with the Grand Jury terminated? A. I am sure there were conversations Mr. Perskie, but I don't know, I can't remember what they were.

Q. Now do you know whether or not Mr. Helfant was subsequently subpoenaed to reappear before the Grand Jury? A. Yes, sir, he was.

(8) Q. Do you know about when the subpoena was received and for what date it was received? A. I believe that he received the subpoena on the 27th or 28th of October, 1972.

Q. Did you personally see the subpoena? A. Yes, sir, I did. Mr. Helfant called me when he received the subpoena and indicated to me that it was served by a De-

tective Sullivan and I told him at that time that I would call Trenton and attempt to get a rush job on the transcript before Judge Kingfield so that we would have that available when we would go to Trenton again.

Mr. Perskie: Could I have this marked?
The Court: Marked for identification.

(Subpoena was marked P-1 for identification.)

By Mr. Perskie:

Q. Mr. McGahn, I show you P-1 for identification and ask you if you can identify that document, sir? A. Yes, sir. This is the subpoena that was a copy of which was given to me by Mr. Helfant either on the 28th or 29th of October, I don't recall.

Mr. Perskie: I offer this for the purpose of hearing if your Honor please.

The Court: Any objection, Mr. Laird? There is no dispute that he got the subpoena, (9) is there?

Mr. Perskie: No, I don't think so.

Mr. Laird: No.

Mr. Perskie: I am trying to bring things in that haven't come before you.

(The exhibit just referred to was received and marked P-1 in evidence.)

Mr. Perskie: With your Honor's permission, may I have this letter marked?

(Letter was received and marked P-2 for identification.)

By Mr. Perskie:

Q. Mr. McGahn, I show you P-2 for identification and ask if you can recognize and identify that document? A. Yes, sir. This is a letter written by me on October 31, 1972, directed to John F. Callinan, Esquire.

Q. Who is John F. Callinan? A. Partner of the firm of Perskie and Callinan of Wildwood, New Jersey.

Q. Why was that document sent to him rather than myself? A. Mr. Perskie, if you recall, you were down in Puerto Rico on a short vacation.

Q. All right. Now, did you write that letter after consultation with the defendant? A. Yes, I did.

(10) Q. And— A. Only that, but after consultation with Mr. Helfant I called Trenton in an attempt to speed up the transcript which I had ordered of the 18th and that explained, I think, the lag of two days between writing the letter to Mr. Callinan and the receipt of the transcript.

Q. Now did Mr. Helfant agree on the course of conduct you outlined in that letter? A. Well, yes, Mr. Perskie, he did.

Mr. Perskie: I'd like to offer this if your Honor please.

Mr. Laird: May I see it, please.

Mr. Perskie: This has been previously attached to exhibits that have been filed in this matter.

Mr. Laird: Yes.

The Court: May be marked.

(The letter was received and marked P-2 in evidence.)

By Mr. Perskie:

Q. Now Mr. McGahn, was there a subsequent appearance of Mr. Helfant before the State Grand Jury after this letter? A. Yes, sir.

Q. Do you remember when that took place? A. Yes, sir, it was the 8th of November, 1972.

(11) Q. And did you accompany Mr. Helfant to Trenton on that date? A. Yes, Mr. Perskie. In fact, you were with me, along with Mr. Helfant.

Q. And do you know from your direct communication with Mr. Helfant what his intention was at that time before he arrived at Trenton with regard to testifying? A. Yes, sir. He was going to take the Fifth Amendment.

Mr. Laird: May I just have a clarification on that question with regard to testifying as to what?

Q. As to anything? A. Yes, sir.

Mr. Laird: His intention to take the Fifth to anything?

The Witness: Yes, that was what he conveyed to me.

Q. Mr. McGahn, what time did you arrive at Trenton on November the 8th? A. We arrived there about 9:20 Mr. Perskie.

Q. And what floor was it? A. It was on the fourth floor of the State House Annex.

The Court: Aren't we getting too detailed, Mr. Perskie? I know where the Supreme Court is. Can we just get to whatever the meat of the (12) testimony is? Mr. McGahn is testifying to all these

details and I don't think they are disputed, are they Mr. Laird?

Mr. Laird: No, your Honor.

Mr. Perskie: I want to have a record. I don't want to burden or press the Court.

The Court: All right.

By Mr. Perskie:

Q. Now Mr. McGahn, who did you see in official position when you got to the fourth floor of the Annex?

Mr. Laird: What does he mean "official position"?

The Court: I don't know.

Q. I don't mean the janitor. Did you see an Attorney General or did you see—

The Court: Wasn't there—and I guess you will get to this—wasn't there a phone call from the Administrative Director?

Mr. Perskie: I will get to that through the one who directly received it.

Q. All right, I will lead you a little. Did you see Deputy Attorney General Hayden? A. I don't believe I saw him immediately upon arriving, but sometime between oh, quarter of nine and 10:30 I did.

Q. And was he conducting a session of the Grand Jury on (13) that date? A. There was a Grand Jury sitting, whether or not he was conducting it at that time, I don't know.

Q. Now do you know where Mr. Helfant went after he got to the State House? A. Yes, sir, I do. He went to the Clerk of the Supreme Court.

Oral Testimony before Judge Kitchen

Q. And where did he go after that? A. I believe he waited for a few minutes in the Clerk's Office while she made a telephone call and then he proceeded down the hall and into the Chambers of the Supreme Court. It is a room that is exactly opposite to where the Grand Jury was sitting at the other end of the hall, at approximately ten minutes of ten.

Q. How long was he in that room to your recollection? A. I would say no longer than fifteen minutes.

Q. Did you see anybody else go into that room either before or after Mr. Helfant went in? A. Shortly thereafter, Mr. Hayden went into the Supreme Court Chambers.

Q. Did you have a conversation with Mr. Helfant when he came out of the Supreme Court Chambers? A. Yes, sir, I did.

Q. What was his appearance at that time? A. Well, he was very, very upset. He appeared completely (14) white and he said, I am going to testify.

Q. And what did you say to him? A. I said, Eddy, you are crazy. I said, as far as I am concerned, the case against you is very weak and if you go in and testify, they will indict you for perjury or false swearing. I said, your testimony is going to be against three cons and I said, I feel very, very strongly about this; and I said, that as you know, that I have urged you from the very beginning not to testify. Mr. Perskie, I didn't get through to Mr. Helfant.

Q. What did he respond if you recall? What did he say? A. He said, it is my ticket, it is my ticket. You are not losing your ticket; and referring to that he meant the right to practice.

Q. And did I talk to him too? A. Yes, you did.

Oral Testimony before Judge Kitchen

Q. In the same vein? A. Yes, sir; in fact, even in stronger terms.

Q. Now after that conversation where did Mr. Helfant go? A. Mr. Helfant remained, I would say, outside the Grand Jury Room for at least, oh a half hour or so or maybe longer waiting to go in to testify.

Q. And did he go in and testify? A. Yes, he did.

Q. Did you ever have any conversation with Hayden or did (15) anyone have any conversation in your presence with Hayden that Helfant was going to testify voluntarily on any matter before that Grand Jury before he went into the Supreme Court Chambers? A. No. The only conversation that I can recall that I had with Mr. Hayden was the fact that Mr. Hayden was very careful. He came out and said that Mr. Helfant would testify about three matters and he said that he would give him his Fifth Amendment rights after it—prior to each of the matters. One, I believe, was an ice box, an ice machine, another was a watch and the third one was the Cantoni matter; but he said—Hayden was very specific, and he said, that Helfant could come out and would come out after each item and he was going to handle each item separately.

Mr. Perskie: I have nothing further, Mr. McGahn. If you want to cross examine.

Cross examination by Mr. Laird:

Q. Just a couple questions, Mr. McGahn. You first began to represent Mr. Helfant in this matter about when? A. I would say somewheres, oh, around the 11th or 12th of October.

Q. That was after— A. He had been served with the first subpoena, I believe.

Q. And he responded to that subpoena on October 18? (16) A. Yes, sir.

Q. Now the second subpoena you said he called or you called him-- A. No, he called me.

Q. Did he indicate what the subpoena was for? A. Testify before the Grand Jury, that was all.

Q. Not about any particular matter? A. He mentioned something about Detective Sullivan said something that he was going to grant him immunity or something to that. I don't recall the full conversation on that, Mr. Laird.

Q. Now when he arrived, this is for the second time to testify on November 8? A. Yes, sir.

Q. When he went into the Grand Jury the first time, what did he testify about?

When he went into the Grand Jury to testify for the first time on that morning? A. Are you talking about the 8th or 18th?

Q. The 8th, the second time he appeared? A. Well, it was either the ice machine or the watch, because Mr. Hayden was very clear and he came out and he was, I thought, went overboard so to speak, to inform me that he would separate each of the items and allow Mr. Helfant to come out, that they would separate investigations sort of.

(17) Q. Now that matter which is the subject matter of the indictment that's involved here, when did he testify about that incident? A. I know that was the last thing he testified about.

Q. And that was approximately how long after he had begun to testify before the Grand Jury? A. I don't know; it might have been just before noon or might have been in the afternoon, I just don't recall that; because there were many other witnesses and I recall and I think, there

was another hijacking case or heavy equipment case or something. You were running witnesses.

Q. Did he indicate to you that he wished to take the Fifth Amendment as to the stolen watch investigation?

Mr. Perskie: At what time?

Q. At any time? A. I don't recall; I really don't.

Q. Did he indicate to you that he wanted to take the Fifth Amendment with respect to the ice machine investigation? A. I don't recall, but I believe that it was his intention to take it to everything but I can't absolutely say concerning those two items, but I definitely know—

Mr. Laird: Thank you Mr. McGahn, you have answered the question.

The Witness: I'd like to finish.

The Court: No, you answered the question.

(18) *Redirect Examination by Mr. Perskie*:

Q. Did you have any other conversation or communication with regard to the defendant with regard to his Fifth Amendment before the appearance before the Supreme Court? A. No, other than—

Mr. Laird: With respect to what?

Mr. Perskie: That's what we'd like to know.

Q. Did he have any conversation—

Mr. Laird: With respect to any particular investigation?

Q. With regard to any matter being investigated by the State Grand Jury? A. Yes, sir. He said, that I be-

lieve, it was Justice Weintraub or Justice Sullivan asked him about the ice machine that was allegedly given to Judge Rauffenbart and also his seating arrangements at his Bar Mitzvah concerning his children.

Q. His son's Bar Mitzvah? A. His son's Bar Mitzvah, and that one of the reasons that I was concerned further about cautioning him on the Fifth Amendment especially on the 18th, was the fact that I saw two of the cons there, Kravitz and Schusterman, and there was a third man there that was subsequently identified as (19) Cantoni. I didn't know Cantoni. I wouldn't know him. I was involved in a case with him but we plead out and I don't recall I ever met Mr. Cantoni.

Mr. Perskie: That's all I have.

The Court: Anything further?

Mr. Laird: Just to indicate my objection about what is hearsay and to take that into consideration.

The Court: Thank you.

Mr. Perskie: I'd like to call Mr. Helfant now if the Court please.

EDWIN H. HELFANT, being first duly sworn, testified as follows:

Direct Examination by Mr. Perskie:

Q. Mr. Helfant, where do you reside, sir? A. 15 McArthur Boulevard, Somers Point, New Jersey.

Q. And you are a licensed member of the Bar of the State of New Jersey? A. I am, sir.

Q. And you are presently a Municipal Court Judge? A.

I am a Municipal Court Judge in two municipalities, but I have taken a voluntary leave of absence from both judgeships.

Q. Mr. Helfant, when was the first time you appeared (20) before a State Grand Jury in connection with the matters that we are concerned with today? A. On October the 18th, nineteen hundred and seventy-two.

Q. And by what means were you summoned before that Grand Jury? A. I was issued a subpoena by Detective Sullivan.

Q. Did you have any conversation with Detective Sullivan or the Attorney General Hayden with regard to your willingness to appear and testify before appearing before the Grand Jury on October the 18th? A. No, sir.

Q. Now you heard the testimony of Mr. McGahn with regard to the matter that transpired before the Grand Jury on October the 18th and before Judge Kingfield; are they correct to your knowledge? A. Yes, sir.

Q. Did you indicate to anybody on that date that you would appear voluntarily before the State Grand Jury and testify to anything? A. No, sir.

Q. Mr. Helfant, when did you receive any notices or subpoenaes from the State of New Jersey in connection with this matter? A. There was another Grand Jury Session on October the 25th where Judge Moore and this Abe Schusterman testified; (21) and on the 27th Detective Sullivan appeared at my office in Atlantic City and handed me the subpoena. I said to Detective Sullivan, I have already invoked the Fifth Amendment. What's this about? He said that the State was thinking about giving me immunity but that he wanted to make me a State's witness. I informed him, State's witness to what? And he said, when you get up there they will tell you.

Q. Did you tell him at that time that you would voluntarily appear and testify as to anything? A. There were no—

Q. Including ice boxes, Bar Mitzvahs, watches? A. There was no discussion whatsoever with Mr. Sullivan other than what are they going to give me immunity for and when you get up there they are going to tell you.

Q. Mr. Helfant, directing your attention to November the 6th, were you in your office on that date? A. No, sir.

Q. Did you have communication with your office on that date? A. Yes.

Q. As a result of your communication with your office on November the 6th, 1972, what did you learn about this case, if anything? A. I had learned the Administrative Director's Office called my office and left a phone number at approximately 3:35 p.m. (22) from the Sheraton Post Motor Inn in Cherry Hill or I think it is Cherry Hill—I put in a call to Mr. McConnell.

Q. Did you speak to him directly? A. I spoke to Mr. McConnell.

Q. And what was the conversation? A. Mr. McConnell told me the Supreme Court wanted to see me at 9:50 a.m. on Wednesday the eighth, which was two days later, the day in between being Election Day. I said to Mr. McConnell that I have a Grand Jury subpoena for 10:00 a.m. on November the 8th. He said, the Court—he didn't say he was—he said the Court is aware of that and they want you at 9:50 in the Clerk's Office. I said, can you tell me what it is in reference to? And he said, the Supreme Court wants to talk to you.

Q. Now you went to Trenton on November the 8th in the company of your two attorneys? A. Both you and Mr. McGahn.

Q. What was your intention with regard to appearing and testifying before the State Grand Jury on that date before you arrived at Trenton? A. Well actually I had no intention, Mr. Perskie, because Mr. Sullivan had said something about immunity and I had already invoked the Fifth Amendment and I didn't intend to testify about anything. I asked you in the car what are they going to give me immunity for?

(23) Q. When you arrived at Trenton, you went to the Clerk's Office of the Supreme Court, did you not? A. Yes.

Q. And you were subsequently ushered into the Supreme Court private Chambers? A. Well, it was scheduled for 9:50 and if you will remember Mr. Perskie, it was raining something awful and the Supreme Court was a little late; and about 9:55 Mrs. Pescoe (sic) took me from her office to the Supreme Court Chambers or conference room, not the Chambers.

Q. Conference Room. Do you know how many Judges were there? A. To my knowledge one judge, I think Justice Proctor was missing, I am not sure, but I think, that Justice Proctor was missing.

Q. Were they sitting in their robes? A. Yes, sir, I think they were; yes, sir.

Q. Now what happened when you came in? A. I walked in and without any good mornings or anything else, the Chief Justice asked me if I thought it right for a Judge to invoke the Fifth Amendment.

Q. Now were they sitting down, the Judges? A. Yes, they were seated.

Q. Were you standing or— A. Mr. Perskie, I don't remember if they told me to be (24) seated or if I was standing up.

Q. And what was your state of mind and your feelings as you entered those Chambers? A. Well Mr. Perskie, I couldn't understand why they wanted me on such a short notice, five minutes or ten minutes before the Grand Jury hearing and I was scared.

Q. Now you said the Chief Justice said something to you. Relate the conversation that took place as nearly as you can? A. The Chief Justice asked me if I thought it right for a Judge to invoke the Fifth Amendment? And I said, Mr. Chief, before I can answer that I'd like to explain. He said, I don't want to get into the merits. I just want you to answer the question. And I said, well the answer to your question is no, I don't think it right; but I said, I would like to explain; and he said, no explanation is necessary.

Q. Was there any other conversation? A. Mr. Justice Sullivan, who had just been appointed and I recognized him, I never met Justice Sullivan before; asked me if I had sat in the Municipal Court since I had invoked the Fifth Amendment; and I told him I had sat once in Somers Point; and he then asked, do I think it right to sit in judgment of other people when I myself had invoked the Fifth Amendment and refused to answer certain questions that were posed to me.

Q. What did you respond? (25) A. I then tried to tell Justice Sullivan about the three convicts and the reports that I had had of what they were saying and I felt that the only way I could protect myself, and the Chief Justice then said, we do not want to get into the merits; and I was cut off from saying any more. The Chief Justice then began to ask me about an ice maker that I was supposed to have purchased for Judge Rauffenbart and I told him I had purchased one and I had a receipt for it and cancelled checks; and he then began to inquire about

this fellow Schusterman and was Schusterman at my son's Bar Mitzvah and I tried to explain how he happened to be there, that he supplied the novelties and the favors. The Chief Justice asked me about the seating arrangements for the Bar Mitzvah and then he asked me who had purchased the liquor for the Bar Mitzvah, whether Mrs. Schusterman was there and whether I had purchased any other gifts for Judge Rauffenbart. He asked if formal invitations were sent out. It was basically things pertaining to Abe Schusterman who I had known had testified on the 25th of October, one week before.

Q. Now was there any file in the presence of the Chief Justice? A. There was a file in front of the Chief Justice, Mr. Perskie, but it was closed and it was with the same brown folder that was submitted to you by Mr. Hayden in your request with the clasp on the top of it. I don't absolutely (26) recall Mr. Perskie, everything that went on in front of the Supreme Court.

Q. How long would you say you were totally, the total time you were before the Court? A. It wasn't longer than ten or twelve minutes, Mr. Perskie.

Q. And when you came out— A. Well, there was one other question the Chief asked me and I think it was the tone, when he said, what do you intend to do today?

Q. And what did you tell him? A. I said, Mr. Chief Justice, I am going to testify.

Q. And why did you make that decision? A. Well Mr. Perskie, the complete aura of the room and the way the questions were posed to me and the manner in which the Chief Justice posed his question to me, frankly, I was scared.

Q. Scared of what? A. I didn't know what they were going to do to me because I had known the nature of the witnesses that had testified before this Grand Jury. I had

seen the Chief Justice posing questions to me about what the Grand Jury later asked me about. I didn't know whether they were going to take my license away to practice law or suspend me pending a hearing. Quite frankly, I knew that the judgeships would go out the window the minute I intend to invoke the Fifth from Justice (27) Sullivan's conversation to me and I was shook as I am right now.

Q. And when you came out of the Supreme Court Chambers were you confronted by your counsel? A. Patty asked me what went on? I said, Pat, I am going to testify.

Q. What did your counsel advise you at that time? A. Well Patty at first said I was making a mistake and that he drew an analogy to another case and he said the only thing they can get you in for is false swearing or perjury. They have no case. I said, Pat, it is my ticket and it is my kids and I am going to testify.

Q. You were concerned about your livelihood? A. Sure, concerned about it right now.

Q. Now Mr. Helfant, did you keep up with the newspaper publicity in this case? A. I sure did.

Q. And did you read the papers outside of the Atlantic County jurisdiction? A. Yes, sir.

Q. Now was there anything to your knowledge in the newspapers with regard to the questions that Chief Justice Weintraub asked you about, your Bar Mitzvah, the liquor, the favors, the seating arrangements? A. None to my knowledge. In fact, I know there wasn't.

(28) Q. When did you first read about any of these items in the newspaper? A. On December the 7th, approximately a month after my Grand Jury appearance.

Mr. Perskie: With the Court's permission, may I have this marked?

The Court: Yes, you may have marked.

(Newspaper article was marked P-3 for identification.)

Q. I show you P-3 for identification and ask you if this is the newspaper article where you first saw these items I have referred to? A. This is the beginning of a few other articles, but this is the first time that it appeared in a newspaper to my knowledge.

Q. And the date of that newspaper is what? A. December 7, 1972.

Q. And what newspaper is that? A. The Press, published in Atlantic County.

Mr. Perskie: I offer this if the Court please.

The Court: May be marked.

(Newspaper article was received and marked Exhibit P-3 in evidence.)

Mr. Perskie: That's all I have.

(29) *Cross examination by Mr. Laird*:

Q. Mr. Helfant, how long have you been a lawyer in the State of New Jersey? A. Since nineteen hundred and fifty-three.

Q. And how long have you been a Municipal Judge? A. I was appointed in Somers Point, New Jersey in April of nineteen hundred and sixty and served there up until 1969, when I was not reappointed; then reappointed again in June of '72 and I have been serving up until the leave of absence in Galloway Township, New Jersey from—don't hold me to the date Mr. Laird, but—I mean the month, but it is 1966 up until the present time.

Q. Now when you appeared on October 18, you refused initially to go into the Grand Jury, is that correct? A. On advice of Mr. McGahn after he had seen Cantoni, Kra-

vitz and Schusterman, he said, I don't even want you to go into the Grand Jury Room.

Q. Did you then attend a hearing before Judge Kingfield? A. Yes, I did.

Q. That hearing was in open Court, was it not? A. Well, there was some conversation in Chambers Mr. Laird, between Mr. Hayden and Mr. McGahn while I was in the Corridor; then it was in open Court.

Q. There was a hearing in open Court? (30) A. Yes.

Q. After that you returned into the Grand Jury; is that correct? A. Well, yes, we returned. We couldn't get a cab, we ran back.

Q. And did you then go into the Grand Jury? A. Yes.

Q. Now after that testimony, did you not have a conversation with Mr. Hayden with respect to the case involving an ice machine? A. No, sir. I had another conversation with Mr. Hayden.

Q. Did you have a conversation with respect to Judge Rauffenbart? A. No, sir. I had a conversation with Mr. Hayden about why don't I cooperate with him and give him somebody in Atlantic County.

Q. Did you have any discussion with him about a stolen watch? A. No, sir.

Q. Now when you returned November 8th, I believe when you appeared before the Supreme Court? A. Yes, sir.

Q. Now at any time did any member of the Supreme Court threaten to move against you to remove your license? A. Absolutely not.

(31) Q. Did they threaten at all to remove you as a Municipal Judge? A. No, sir, not verbal threats; no, sir.

Q. It is a fact, is it not, that at least approximately three weeks prior thereto you had indeed taken the Fifth Amendment before the Grand Jury? A. Yes, sir.

Q. And there had been no action taken against you, had there, as a lawyer or Municipal Judge? A. No, sir; that's what upset—

Q. Excuse me. A. That's what upset me. They would call 3:30 on a Monday afternoon and tell me to be there without notice, without any reason and tell me to be there at 9:50 in the morning when I had a Grand Jury appearance and I was nervous enough about that.

Q. Did they indicate what the consequences of your— A. They didn't discuss anything with me Mr. Laird, other than what are my intentions and do I think it right.

Q. Did Mr. Hayden threaten to take any action against you to have your license removed? A. Mr. Hayden didn't threaten in that manner. Mr. Hayden said if I didn't cooperate—

Q. Just answer the question. A. About the Supreme Court?

(32) Q. No, did Mr. Hayden threaten to take any action against you to have your license removed as a lawyer; yes or no? A. Not to take it away from me, no.

Q. Did he threaten to take any action to remove you as a Municipal Judge? A. No.

Q. Did he at all times advise you of your rights before you testified? A. In the Grand Jury Room, yes.

Q. Now you stated today that the Chief Justice said at the conclusion, I believe, of your little meeting with them, "What do you intend to do today?" Now is it not a fact Mr. Helfant that you filed affidavits in this particular case over two months ago? A. I filed some affidavits, yes, sir.

Q. And did you not in that affidavit discuss what went on in the Supreme Court Chambers? A. Somewhat, yes.

Q. And did you ever say that the Chief Justice had said, "What do you intend to do today?" A. The Chief Justice didn't—

Q. Could you just answer the question? A. No, I didn't say that at all.

Q. All right. Thank you. Mr. Hayden and Mr. Sullivan filed affidavits in this case as you know, almost two months (33) ago and in that affidavit of Mr. Hayden, he indicated that you did have a discussion with him after your taking the Fifth Amendment on October 18?

Mr. Perskie: If the Court please, I would object to Mr. Hayden's affidavit. Mr. Hayden is a party defendant in this matter. He hasn't appeared. We tried to get him to state in Court on innumerable occasions what his position was and he has refused to do so. He's claimed a privilege; he's claimed a certain right of interdepartmental—

The Court: Affidavits are on record. How can I disregard them?

Mr. Perskie: Because I think the man should be here subject to cross examination.

Mr. Laird: That's his opinion and the affidavits have indeed been on record and I am cross examining this witness.

The Court: You may proceed, Mr. Laird.

By Mr. Laird:

Q. Now I will return to it. Those affidavits by Mr. Hayden and Mr. Sullivan were, in fact, submitted over two months ago. In the affidavit of Mr. Hayden he states and I can quote it to you—let me get it right—excuse me just a minute, your Honor.

(34) The Court: All right.

Q. Paragraph three of the affidavit he states, "That upon leaving the Grand Jury around 5:30 or 6:00 pm., Detective Sullivan and I spoke briefly to Helfant. Helfant was then informed that the State Grand Jury was also investigating his connection with an ice machine, which was procured by Abe Schusterman with a bad check and ultimately given to Judge Thomas Rauffenbart and Helfant expressed a desire to testify about this matter."

Now, Mr. Helfant, that was on record for almost two months before you took any issue with that statement. Is it your testimony now that you directly refute that statement? A. Absolutely. There is not such conversation. It was the conversation I related to.

Q. Thank you. Is it not a fact that you did not respond in your affidavit for at least two months to that particular statement? A. I don't know whether Mr. Perskie responded or not to that affidavit.

Q. Well, it is your affidavit, is it not? A. My affidavit attached to this proceeding.

Q. Anywhere in the proceeding did an affidavit in this proceeding respond to that statement within those two months? A. I don't know.

Q. Thank you. You stated that you were very concerned (35) about your livelihood and whether you might lose your license to practice and whether you might be removed as a Municipal Judge, when you appeared before the Supreme Court Chambers. Were you not equally concerned three weeks earlier when you went into open Court and it became a matter of public record that you indeed took the Fifth Amendment, a lawyer and a judge took the Fifth Amendment before the Grand Jury? A. Of course

I was concerned Mr. Laird; but I was acting on advice of Mr. McGahn after we saw the nature of the State's witnesses, the caliber of the State's witnesses.

Q. And Mr. McGahn's advice to you after your appearance before the Grand Jury was not to testify, was it not? A. On the 18th?

Q. On the 8th? A. After I left the Supreme Court?

Q. After you left the Supreme Court? A. No one in this world could have made me take the Fifth.

Q. You did not act on his advice? A. No, sir.

Redirect Examination by Mr. Perskie:

Q. Was any counsel with you or invited in with you to the Supreme Court Chambers? (36) A. No, sir.

Q. Did you put your entire conversation with the Supreme Court in the prior affidavits filed in this matter? A. Mr. Perskie, if you recall, I made you rewrite that affidavit four or five times, because I was very reluctant to file any affidavit about any proceeding with the Supreme Court, because I was then, as I am now, concerned about my confrontation with the Supreme Court.

Mr. Perskie: That's all I have.

The Court: I'd like to ask one question of Mr. Helfant if I may. I want to ask you about the affidavit which you have filed and I want to ask you whether or not this statement was in it if you can recall, and this I am quoting from the context of the papers on file. "I cannot say that the Supreme Court in any way directed me to testify, nor did they in any way indicate to me what the consequences would be if I continued to stand by the Fifth Amendment."

The Witness: Yes, sir.

The Court: That is your statement?

The Witness: Yes, sir.

The Court: Thank you, sir. You may step down.

(37) Mr. Perskie: If your Honor please, with all due respect to the Court, that is taken out of context and I'd like to have the balance of the paragraph read into the record.

The Court: All right, you can read it.

Mr. Perskie: This is the balance of the paragraph, is it not Mr. Helfant? "However, from the very fact that I was summoned there, and from the comments of the Chief Justice and Mr. Justice Sullivan, I was concerned that in the event I concluded I should not testify, the Supreme Court might have taken some action against me because of my refusal." That is the balance of your sentence?

The Witness: Yes, sir.

The Court: That was your assumption?

The Witness: Yes, sir, because—

The Court: Nothing was said by the Court that that would happen?

The Witness: No, sir; but I imagined from the fact that they did not discuss anything else with me except the questions that were later posed to me at the Grand Jury, and frankly, the Chief Justice's tone to me, I decided I was going to testify.

(38) The Court: Thank you very much.

The Witness: Your Honor, there is no question pending, but may I say something to the Court?

The Court: No. It is very unusual even from a lawyer. You have counsel here representing you.

Oral Testimony before Judge Kitchen

The Witness: May I be excused for one second to discuss something with counsel and resume the stand?

The Court: All right.

(Discussion off the record.)

The Witness: I have nothing further, your Honor.

The Court: All right gentlemen, thank you.

(Mr. Perskie argued on behalf of the plaintiff.)

(Mr. Laird argued on behalf of the defendants.)

• • •

CERTIFICATE

I, DOROTHY C. Boss, a Certified Shorthand Reporter of the State of New Jersey, do hereby certify the foregoing to be a true and accurate transcript of the testimony and proceedings had before me.

/s/ Dorothy C. Boss
DOROTHY C. Boss, C.S.R.

Dated: May 10, 1973

Oral Opinion of Judge Kitchen

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Oral Opinion—No. 607-73

Before: HON. JOHN J. KITCHEN, U.S.D.J.

Dated May 9, 1973, Camden, New Jersey

(2) The Court: Gentlemen, after considering the briefs and the affidavits submitted by the parties, and the oral arguments of counsel and testimony, this Court has determined that the plaintiff's petition to preliminarily enjoin the pending State Criminal Prosecution against him should be and is hereby denied.

Although this Court has jurisdiction in a suit brought under the 1938 Section to issue an injunction against a State Criminal Proceeding under the recent case of Mitchum, but in my opinion the plaintiff has failed to establish that federal intervention here is permissible under the guidelines of Younger versus Harris.

Younger and its companion cases set out a narrow exception to the broad and well settled policy that Federal Equity Courts should not intervene into pending State Criminal Proceedings.

They set out, in order for the federal intervention to be proper, Younger holds that the plaintiff must establish that the State Prosecution was brought in bad faith in order to harass the defendant. Second: That the irreparable harm to the defendant must be both great and immediate and must be more than those (3) injuries that are usually incidental to every criminal proceeding. Third:

That the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.

Although this case does not present a challenge to the constitutionality of a State Statute, Younger does apply since the focus of Younger on intervening in pending State Criminal Proceedings which is exactly the relief sought here.

Applying the above guidelines of Younger to the facts of this case, the Court finds that the allegations by the plaintiff do not establish that the prosecution was initiated in bad faith for the purpose of harassing the plaintiff, nor for the alleged purpose of coercing the plaintiff to involuntarily relinquish his Fifth Amendment rights against self incrimination in order to obtain indictments against him for false swearing. From the record before this Court, it appears that the prosecution of the plaintiff grew out of an on-going State Grand Jury Investigation into alleged acts of misconduct that had been initiated prior to the (4) incidents alleged by the plaintiff.

The plaintiff has failed to establish irreparable harm which is both great and immediate. The only harm alleged by the plaintiff is that harm incidental to the defense of a criminal prosecution. The defense of a criminal charge based on an indictment that is alleged to be constitutionally defective does not amount to that degree of harm required as one of the prerequisites to Federal Injunctive Relief.

The plaintiff's defense to the state criminal charge against him does afford him an adequate method to seek vindication of his constitutional rights. For this Court to

hold otherwise, this Court would have to assume that the State Trial and Appellate Courts would not review plaintiff's contention impartially and fairly; an assumption which this Court is not willing to make.

In addition, the defendant's motion to dismiss the complaint for lack of jurisdiction is also denied, however, because the only relief requested in the complaint is injunctive, the defendant's motion to dismiss for failure to (5) state a claim is hereby granted.

You may prepare the order Mr. Laird.

Mr. Perskie: Could we obtain a temporary restraint pending the making of appeal to the Circuit Court?

The Court: No, I won't do that Mr. Perskie.

All right. Court's adjourned.

• • •

CERTIFICATION

I, DOROTHY C. BOSS, a Certified Shorthand Reporter of the State of New Jersey, do hereby certify the foregoing to be a true and accurate partial transcript of the testimony and proceedings had in the above entitled cause.

/s/ Dorothy C. Boss
DOROTHY C. BOSS, C.S.R.

Dated: May 9, 1973

Order of United States District Court Granting Petitioner's Motion to Dismiss the Complaint, dated May 9, 1973

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL NO. 607-73

EDWIN H. HELFANT,

Plaintiff,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, *et als.*,

Defendants.

This matter having been opened before the Court by Marvin D. Perskie and Patrick T. McGahn, Jr., co-counsel for the plaintiff, Edwin H. Helfant, an Application for an Injunction against a State Court criminal proceeding under 42 United States Code Annotated Section 1983 and under 28 United States Code Annotated Section 1343, and cross motion having been made by the defendants to dismiss the complaint on the grounds that the court does not have jurisdiction and on the grounds that the complaint does not state a claim upon which relief can be granted, and coming on to be heard in the presence of Edward C. Laird, Deputy Attorney General of the State of New Jersey, attorney for the defendants, and argument having been considered together with briefs, affi-

Order of United States District Court Granting Petitioner's Motion to Dismiss the Complaint dated May 9, 1973

davits, certified pleadings and oral testimony having been heard,

IT IS, on this 9 day of May, 1973

ORDERED and ADJUDGED that the United States District Court for the District of New Jersey has jurisdiction over the subject matter.

IT IS FURTHER ORDERED and ADJUDGED that the defendants' motion to dismiss the complaint for failure to state a claim upon which relief can be granted be and is herewith GRANTED. Application for stay pending appeal is denied.

JOHN J. KITCHEN
Judge, U. S. District Court

I consent to the entry of the above Order.

EDWARD C. LAIRD
Deputy Attorney General

I consent to the form of the above Order.

MARVIN D. PERSKIE
Co-Counsel for Plaintiff, Edwin H. Helfant

Opinion of the United States Court of Appeals for the Third Circuit, dated September 10, 1973

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1386

EDWIN H. HELFANT,

Appellant,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Appellees.

(CIVIL ACTION No. 607-73)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued September 7, 1973

Opinion of the United States Court of Appeals for the Third Circuit, dated September 10, 1973

Before:

STALEY, ADAMS and GIBBONS, Circuit Judges

PERSKIE & CALLAHAN, ESQS.
By: MARVIN D. PERSKIE, ESQ.
PATRICK T. MCGAHN, JR.
3311 New Jersey Avenue
Wildwood, New Jersey 08260
Attorneys for Appellant

GEORGE F. KUGLER, JR., ESQ.
Attorney General of New Jersey
State House Annex
Trenton, New Jersey 08625
Attorney for Appellees

OPINION OF THE COURT

(Filed—September 10, 1973.)

PER CURIAM

This is an appeal from an order of the district court which (1) denied plaintiff's motion for a preliminary injunction prohibiting the Attorney General of New Jersey and others from proceeding with the prosecution of an indictment pending in that state, and (2) granted the defendants' motion to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court held an evidentiary hearing on the motion for a preliminary injunction, but in view of its ruling on the defendants' motion made no findings of fact.

Opinion of the United States Court of Appeals for the Third Circuit, dated September 10, 1973

The plaintiff-appellant Helfant is a member of the New Jersey bar and a former municipal court judge of that state. His verified complaint alleges:

> "4. Some time before October 18, 1972 the State of New Jersy began a State Grand Jury Investigation, inter alia, into an alleged illegal withdrawal on an indictable criminal charge of atrocious assault and battery arising out of an incident occurring on March 17, 1968 in Egg Harbor City, Atlantic County, New Jersey, in which the plaintiff was alleged to have participated. This State Grand Jury investigation was personally conducted by the defendant, Joseph A. Hayden, Jr., Deputy Attorney General of the State of New Jersey.
>
> 5. The plaintiff, Edwin H. Helfant, was a designated target of the State Grand Jury investigation and was so advised by the Deputy Attorney General aforedesignated, who was handling the matter, when he first appeared before the State Grand Jury on October 18, 1972 at which time he resorted to his privilege under the Fifth Amendment of the United States Constitution and refused to testify.
>
> 6. He was subsequently subpoenaed to appear again before the State Grand Jury on November 8, 1972. The State Grand Jury at that time sat at the State House Annex, Trenton, New Jersey at the other end of the hall from the private chambers of the Chief Justice and Justices of the New Jersey Supreme Court.

Opinion of the United States Court of Appeals for the Third Circuit, dated September 10, 1973

> 7. On November 6, the Administrative Director of the Courts of New Jersey called the law offices of the plaintiff in Atlantic City, New Jersey. About 3:30 in the afternoon, after being given the message of this call, plaintiff returned the call to the Administrative Director. He was directed by the Administrative Director to appear before the Supreme Court in their private chambers at 10 minutes before 10 on November 8, 1972. The plaintiff advised the Administrative Director that at 10 o'clock he had to appear before the Grand Jury. The Administrative Director advised the plaintiff that the Supreme Court was well aware of this fact and that he was still to be before the Supreme Court. No reason was given for this appearance and no other direction to appear, other than the telephone message of the Administrative Director made to the plaintiff directly, and to his office. At or about the designated time on November 8, 1972 the plaintiff went into the chambers of the Supreme Court at the State House, Trenton, New Jersey. He was questioned by the Chief Justice and Associate Justice Sullivan in the presence of the Court. The Chief Justice inquired of the defendant whether he thought a Judge should invoke the Fifth Amendment. Justice Sullivan asked what the plaintiff's feelings were about a Judge sitting in judgment of other people while he himself was invoking the Fifth Amendment before a Grand Jury. He also asked plaintiff if he had sat as a Judge since invoking the Fifth Amendment. Chief Justice Weintraub and another Justice also asked of plaintiff some

questions about his son's Bar Mitzvah, which matters were contemporaneously being considered by the State Grand Jury, including seating arrangements and who paid for the liquor. These questions also concerned an Abe Schusterman, who was a State's witness against the plaintiff and who had appeared before the State Grand Jury. The Chief Justice also questioned plaintiff about Atlantic County Judge Thomas Rauffenbart and an ice-making machine that was involved in a.. d pay-off in a criminal case involving Abe Schusterman, all of which matters were then being considered and investigated by the State Grand Jury which was being conducted by the defendant Joseph A. Hayden, Jr. under the direction of Attorney General George F. Kugler.

The questions posed to the plaintiff by the Justices of the Supreme Court were in connection with matters then being considered by the State Grand Jury. There had been no public release of these matters, particularly the Bar Mitzvah, seating arrangements thereat, arrangements for the liquor and the gift of an ice machine. These matters had to be a portion of the raw evidence then being considered by the State Grand Jury and released and given to the Supreme Court during the pendency of the Grand Jury proceedings by defendant Deputy Attorney General Joseph A. Hayden, Jr., who was conducting the Grand Jury investigation.

After the plaintiff left the Supreme Court chambers, he was in a state of confusion and bewilder-

ment and had to go immediately before the State Grand Jury. On a previous occasion before the State Grand Jury he had encountered three State's witnesses who were then in State and County Prisons serving sentences for various crimes, two of said witnesses having long records. He had been advised by Detective William Sullivan of the New Jersey State Police, who was assisting Deputy Attorney General Hayden in the investigation, of the thrust of some of the testimony of these witnesses, which testimony if believed would incriminate the plaintiff. He was therefore in a position that if he testified at variance with these witnesses, even though it were the truth, the State Grand Jury would be faced with inconsistent statements and could indict him for false swearing, as he was. He was faced with the proposition that if he agreed with the testimony of these witnesses, he could be indicted for conspiracy, as he was. Knowing of these witnesses, i.e., John Cantoni, Shelly Kravitz and Abe Schusterman, their reputations and backgrounds and long records of convictions, plaintiff was aware that they had to have testified as a result of promises and commitments made to them in connection with shortening their prison stays, which facts were later admitted by the Deputy Attorney General Joseph A. Hayden, Jr. in connection with answers made to discovery wherein he admitted that recommendations of leniency and dropping of charges had been made in the cases of all three men.

8. As a result of these questions, the plaintiff, whose previous counsel-advised intentions and will were completely discarded and overcome and who was quite emotionally upset by the confrontation, indicated to the Justices that he would indeed waive his Fifth Amendment privilege and testify in full before the State Grand Jury, fearing not only the loss of his Judgeship, but his accreditation as a member of the bar as well.

9. Immediately after the plaintiff left the chambers of the New Jersey Supreme Court, Deputy Attorney General Joseph A. Hayden, Jr., who was then conducting the State Grand Jury investigation of which plaintiff was a target, went into the Supreme Court chambers and stayed there for a short period of time and then left. It is believed he preceded the plaintiff into the chambers and that he had previous contact about plaintiff with the Supreme Court about the pending investigation."

The complaint also alleges:

"14. As a result of the intrusion by the Deputy Attorney General and the disclosure to the Supreme Court of factual matters involved in a Grand Jury investigation during pendency of that investigation, and because of the intrusion of the New Jersey Supreme Court into the Grand Jury investigation and the communication between the Supreme Court of New Jersey and the Deputy Attorney General conducting the Grand Jury investigation, the plaintiff herein is made to suffer great, immediate, substantial and irreparable harm in that he must attempt to defend criminal charges brought in a State in which there has been prejudicial collusion directly affecting plaintiff, whether intentional or inadvertent between the Judicial and Executive branches of the New Jersey State government. Plaintiff is being made to defend criminal charges which have been obtained, inter alia, as a result of that collusion, and the deprivation of plaintiff's constitutional rights by not too subtle cooperative coercion on the part of the defendants. Furthermore, in the event of his conviction upon any one of the charges presently pending against him, plaintiff's only recourse would be review by the State Courts and ultimately the New Jersey Supreme Court, which Court he has alleged has been involved in the prosecution of the charges against him."

Insofar as this appeal reviews the order dismissing Helfant's appeal for failure to state a claim upon which delief may be granted these factual allegations must be taken as true.

The opposing affidavits filed by the state defendants in opposition to Helfant's motion for a preliminary injunction do not dispute any of the historical factual allegations of the Complaint quoted above, except that defendant Hayden avers:

"I had no knowledge that Helfant was to appear before the New Jersey Supreme Court until I was called by the Supreme Court on November 6, 1972 and told that Helfant might be a few minutes late for his grand jury appearance."

Read in the light most favorable to those defendants, the affidavits do tend to suggest that Helfant's testimony before the grand jury was the result of a voluntary waiver of his privilege against self incrimination rather than of any compulsion by the Supreme Court. It is fair to say that for purposes of the motion for a preliminary injunction, whether Helfant's testimony was the result of compulsion was put in issue and that this issue could be resolved only by an evidentiary hearing.

At the evidentiary hearing Helfant presented the testimony of Patrick T. McGahn, one of his attorneys, and testified himself. On the disputed issue of compulsion to testify before the grand jury this testimony by Helfant is relevant:

"Q. Now you went to Trenton on November the 8th in the company of your two attorneys? A. Both you and Mr. McGahn.

Q. What was your intention with regard to appearing and testifying before the State Grand Jury on that date before you arrived at Trenton? A. Well actually I had no intention, Mr. Perskie, because Mr. Sullivan had said something about immunity and I had already invoked the Fifth Amendment and I didn't intend to testify about anything. I asked you in the car what are they going to give me immunity for?

Q. When you arrived at Trenton, you went to the Clerk's Office of the Supreme Court, did you not? A. Yes.

Q. And you were subsequently ushered into the Supreme Court private Chambers? A. Well, it was scheduled for 9:50 and if you will remember Mr. Perskie, it was raining something awful and the Supreme Court was a little late; and about 9:55 Mrs. Peskoe took me from her office to the Supreme Court Chambers or conference room, not the Chambers.

Q. Conference Room. Do you know how many Judges were there? A. To my knowledge one judge, I think Justice Proctor was missing, I am not sure, but I think, that Justice Proctor was missing.

Q. Were they sitting in their robes? A. Yes, sir, I think they were; yes, sir.

Q. Now what happened when you came in? A. I walked in and without any good mornings or anything else, the Chief Judge asked me if I thought it right for a Judge to invoke the Fifth Amendment.

Q. Now were they sitting down, the Judges? A. Yes, they were seated.

Q. Were you standing or— A. Mr. Perskie, I don't remember if they told me to be seated or if I was standing up.

Q. And what was your state of mind and your feelings as you entered those Chambers? A. Well Mr. Perskie, I couldn't understand why they wanted me on such short notice, five minutes or ten minutes before the Grand Jury hearing and I was scared.

Q. Now you said the Chief Justice said something to you. Relate the conversation that took place as nearly as you can? A. The Chief Justice asked me if I thought it right for a Judge to invoke the Fifth Amendment? And I said, Mr. Chief, before I can answer that I'd like to explain. He said, I don't

want to go into the merits. I just want you to answer the question. And I said, well the answer to your question is no, I don't think it right; but I would like to explain; and he said, no explanation is necessary.

Q. Was there any other conversation? A. Mr. Justice Sullivan, who had just been appointed and I recognized him, I never met Justice Sullivan before; asked me if I had sat in the Municipal Court since I had invoked the Fifth Amendment; and I told him I had sat once in Somers Point; and he then asked, do I think it right to sit in judgment of other people when I myself had invoked the Fifth Amendment and refused to answer certain questions that were posed to me.

Q. What did you respond? A. I then tried to tell Justice Sullivan about the three convicts and the reports that I had had of what they were saying and I felt that the only way I could protect myself, and the Chief Justice then said, we do not want to get into the merits; and I was cut off from saying any more. The Chief Justice then began to ask me about an ice maker that I was supposed to have purchased for Judge Rauffenbart and I told him I had purchased one and I had a receipt for it and cancelled check; and he then began to inquire about this fellow Schusterman and was Schusterman at my son's Bar Mitzvah and I tried to explain how he happened to be there, that he supplied the novelties and the favors. The Chief Justice asked me about the seating arrangements for the Bar Mitzvah and then he asked me who had purchased the liquor for the Bar Mitzvah, whether Mrs. Schusterman was there and whether I had purchased any other gifts for Judge Rauffenbart. He asked if formal invitations were sent out. It was basically things pertaining to Abe Schusterman who I had known had testified on the 25th of October, one week before.

Q. Now was there any file in the presence of the Chief Justice? A. There was a file in front of the Chief Justice, Mr. Perskie, but it was closed and it was with the same brown folder that was submitted to you by Mr. Hayden in your request with the clasp on the top of it. I don't absolutely recall Mr. Perskie, everything that went on in front of the Supreme Court.

Q. How long would you say you were totally, the total time you were before the Court? A. It wasn't longer than ten or twelve minutes, Mr. Perskie.

Q. And when you came out— A. Well, there was one other question the Chief asked me and I think it was the tone, when he said, what do you intend to do today? A. And what did you tell him? A. I said, Mr. Chief Justice, I am going to testify."

The district court denied preliminary relief and dismissed the complaint on the ground that *Younger* v. *Harris,* 401 U. S. 371 (1971) precluded federal intervention. In the posture in which the case is before us, the district court has ruled only on the legal sufficiency of the complaint, and has not made any findings of fact. Whether or not Helfant's testimony before the grand jury was voluntary or coerced is a crucial fact issue. Although no testimony was offered by the state defendants, on that crucial fact issue the district court, had it made factual

findings, might have found Helfant's testimony not credible, and might on this ground have declined to issue a preliminary injunction. But for purposes of a motion to dismiss pursuant to Rule 12(b)(6) that possibility is irrelevant. In reviewing the order granting that motion we must take as true Helfant's contention that he was coerced by the Supreme Court of New Jersey into testifying before the grand jury and that he is about to be tried on an indictment resulting from that coerced testimony. The record establishes that a trial court has declined to quash the indictment and that attempts to obtain interlocutory appellate relief in the New Jersey courts have been unavailing. Even if at a later stage a New Jersey trial court were to quash the indictment the state could appeal that decision to the Supreme Court of New Jersey. *See, e.g., State* v. *Winne,* 12 N. J. 152 (1953).

Younger v. *Harris, supra,* holds that a federal court should not enjoin a pending state prosecution in the absence of a showing of bad faith, harassment or ". . . other extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment." *Younger* v. *Harris, supra,* 53. *See Lewis* v. *Kugler,* 446 F. 2d 1343 (3d Cir. 1971); *Conover* v. *Montemuro,* 447 F. 2d 1073, 1080 (3d Cir. 1973). Neither the Supreme Court nor this court has considered what extraordinary circumstances will justify federal intervention in a pending state prosecution. But the *Younger* v. *Harris* line of cases is predicated upon the fundamental assumption that defense of the pending state prosecution affords an adequate remedy at law for the vindication of the federal constitutional

right at issue. Exceptional circumstances, then, must include circumstances reflecting upon the likelihood that the state forum will afford an adequate remedy at law. If the circumstances here alleged do not fall within that category it would be difficult to imagine any that would. If it is true that Helfant is being tried on an indictment which resulted from his testimony before the grand jury coerced from him by the Supreme Court of New Jersey, his fifth amendment privilege against self incrimination has already been violated, and the effect of that violation is, by virtue of the ongoing prosecution, continuing. Since the Supreme Court of New Jersey is accused of having exercised the coercion, a remedy in the courts of New Jersey, and ultimately in that Court, hardly seems adequate.

We hold, then, that *Younger* v. *Harris, supra* did not require the dismissal of the complaint. That holding requires a reversal and remand.

The order denying the preliminary injunction is also predicated upon *Younger* v. *Harris, supra.* We did not hear the testimony of Mr. McGahn and Mr. Helfant, and we cannot judge the credibility of Helfant's testimony that he was coerced. At the same time, on the record before us his testimony is not contradicted except by affidavits, and those affiants have not been cross examined. The record is sufficient to suggest that the satus quo be preserved until such time as the district court can make findings of fact. Mindful that present or even potential interference with a pending state prosecution is a matter of utmost gravity, this case should on remand receive accelerated consideration and the court should enter an order consolidating the hearing on the motion for a preliminary injunction with a trial on the merits. Rule 65(a)(2) Fed. R. Civ. Proc.

At the oral argument on this appeal we asked the attorney for the appellees if the State intended to commence the trial of the indictment, now scheduled for September 10, 1973, while this appeal was *sub judice*. We were advised that this was the State's intention. Accordingly we issued an order enjoining commencement of the prosecution until such time as we could decide the appeal.

The order dismissing the complaint will be reversed. The order denying the motion for a preliminary injunction will be vacated, and the case will be remanded to the district court for the entry of an order temporarily enjoining the trial of Indictment No. SGJ 10-72-10 until final hearing, and for the entry of an order consolidating hearing on the motion for a preliminary injunction with trial on the merits. We direct that that trial be commenced forthwith, and that the district court shall make findings of fact and conclusions of law within thirty days from the date of the mandate of this court. The mandate of this court shall issue forthwith.

ARLIN M. ADAMS, *Circuit Judge*, concurring:

I concur in the result reached by the majority in this matter. Although the doctrine of *Younger* v. *Harris* generally precludes a federal district court from enjoining a criminal proceeding already under way in the state court, there are limited exceptions to this wise rule of comity. One of those exceptions, as I read *Younger*, arises when "extraordinary circumstances" or "unusual circumstances," 401 U. S., at 53 and 54, exist. As the recitation set forth in the majority opinion demonstrates,

it would seem to me that such extraordinary or unusual circumstances are asserted here so as to make it appropriate for the district court to proceed with findings of fact and conclusions of law.

The plaintiff claims, both in his pleadings and in his evidence, that he was coerced by members of the State Supreme Court into relinquishing his Fifth Amendment right not to testify before the grand jury. He asserts that he then did testify, and that as a result, he was indicted because of his allegedly coerced testimony. He sought, in the state court, to have the indictment dismissed because it was based on the coerced testimony, but his motion was refused, and the state appellate courts declined to entertain his appeal.

If the district court should determine, after an appropriate evidentiary inquiry, that this plaintiff's Fifth Amendment right *has* been abridged, in the factual setting of this case an exception to Younger's precept of non-interference would obtain.[1]

---

[1] Although the plaintiff names as defendants the Justices of the Supreme Court of New Jersey as well as that State's Attorney General, the final injunction, if issued, may be limited to the Attorney General, prohibiting him from continuing criminal proceedings against plaintiff. It should also be noted that plaintiff does not seek money damages.

Certified Judgment in Lieu of Mandate, dated September 10, 1973

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1386

EDWIN H. HELFANT,

Appellant,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Appellees.

(D. C. Civil Action No. 607-73)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present:

STALEY, ADAMS and GIBBONS, Circuit Judges

Certified Judgment in Lieu of Mandate, dated September 10, 1973

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this Court that the order of the said District Court, filed May 9, 1973, which order dismissed the complaint for failure to state a claim upon which relief could be granted, be and hereby is reversed. The order of May 9, 1973, of the said District Court which order denied plaintiff's motion for a preliminary injunction be and hereby is vacated and the cause remanded to the District Court for the entry of an order temporarily enjoining the trial of Indictment No. SGJ 10-72-10 until final hearing, and for the entry of an order consolidating hearing on the motion for a preliminary injunction with trial on the merits, and it is directed that that trial be commenced forthwith, and that the district court shall make findings of fact and conclusions of law within thirty days from the date of the mandate of this Court, all in accordance with the opinion of this Court.

ATTEST:

THOMAS P. QUINN
Clerk

September 10, 1973

Order Vacating Judgment, Granting Petition for Rehearing and Denying Petition for Rehearing En Banc, dated October 31, 1973

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17-1386

EDWIN H. HELFANT,

Appellant,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Appellees.

(Civil Action No. 607-73)

Present:

SEITZ, Chief Judge, STALEY, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

Order Vacating Judgment, Granting Petition for Rehearing and Denying Petition for Rehearing En Banc, dated October 31, 1973

ORDER

The Petition for Rehearing filed by the defendants-appellees having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the Circuit in regular active service, and the judges who concurred in the decision of the panel which heard the appeal having voted for panel rehearing,

It is ORDERED that the Petition for Rehearing en banc is denied, and it is further

ORDERED that the judgment of this court dated September 10, 1973 be and is hereby vacated, and the Clerk of this Court shall list this appeal for submission to a panel consisting of Judges Staley, Adams, and Gibbons pursuant to Rule 12(6) on November 19, 1973, and it is further

ORDERED that the parties shall, simultaneously, on or about November 10, 1973 file with the court supplemental briefs on the question whether, assuming appellant's testimony before the grand jury was coerced, he has standing on the ground to object to a trial on Indictment No. SGJ-10-72-10 or on any count thereof. *See Gelbard* v. *United States,* 408 U. S. 41, 60 (1972); *United States* v. *Blue,* 384 U. S. 251 (1966); *Lawn* v. *United States,* 355 U. S. 339 (1958); *compare Garrity* v. *New Jersey,* 385 U. S. 493 (1967).

By the Court,

JOHN J. GIBBONS
Circuit Judge

Dated: October 31, 1973

Order Granting Rehearing En Banc, dated January 11, 1974

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 73-1386

EDWIN H. HELFANT,

Appellant,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Appellees.

(Civil Action No. 607-73)

Present:

SEITZ, Chief Judge, STALEY, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

A majority of the active Judges having voted for rehearing en banc in the above-entitled case,

It is ORDERED that the Clerk of this Court list the above case for rehearing before the Court en banc at the convenience of the Court.

By the Court,

ARLIN M. ADAMS
Circuit Judge

Dated: January 11, 1974

Opinion of the United States Court of Appeals for the Third Circuit, *En Banc*, dated July 8, 1974

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 73-1386

EDWIN H. HELFANT,

Appellant,

v.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDEN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(Civil Action No. 607-73)

Opinion of the United States Court of Appeals for the Third Circuit, En Banc, dated July 8, 1974

Argued September 7, 1973

Submitted Under Third Circuit Rule 12(6)
November 19, 1973

Before: STALEY, ADAMS and GIBBONS, *Circuit Judges.*
Reargued April 10, 1974

Before: SEITZ, *Chief Judge,* and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

OPINION OF THE COURT

(Filed—July 8, 1974.)

Perskie & Callinan, Esqs.
By Marvin D. Perskie, Esq.
Patrick T. McGahn, Jr., Esq.
Wildwood, New Jersey
Counsel for Appellant

George F. Kugler, Jr., Esq.
Attorney General of New Jersey
Trenton, New Jersey

David S. Baime, Deputy Attorney General
Alfred J. Luciani, Deputy Attorney General
Edward C. Laird, Deputy Attorney General
Counsel for Appellees

ALDISERT, *Circuit Judge.*

Presenting a delicate question of federal-state comity, this appeal requires us to decide whether federal fact-

Opinion of the United States Court of Appeals for the Third Circuit, En Banc, dated July 8, 1974

finding should be utilized to determine whether a New Jersey municipal court judge's testimony before a state grand jury was the product of a free and unconstrained will. Contending that his Fifth Amendment rights as guaranteed by the Fourteenth Amendment will not be vindicated by the New Jersey state court system, appellant argues that the federal courts should provide relief because highly unusual circumstances dictate an exception to the familiar restrictive rule of *Younger* v. *Harris,* 401 U. S. 37 (1971).

I.

This is an appeal from an order of the district court which (1) denied plaintiff's request for a preliminary injunction prohibiting the Attorney General of New Jersey and others from proceeding with the prosecution of an indictment pending in that state,[1] and (2) granted the de-

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[1] The plaintiff was arraigned on the Indictment SGJ 10-72-10 on February 2, 1973. Trial was originally set for May 14, 1973.

The state's brief in support of its motion to dismiss in the district court discloses:

> Plaintiff herein, Edwin Helfant, stands charged in a nine count indictment handed up by the State Grand Jury charging him with conspiring with his codefendant, Samuel Moore, to obstruct justice, with obstructing justice in connection with his codefendant, Samuel Moore, with aiding and abetting compounding a crime and with four counts of false swearing. * * * All of the substantive offenses stem from the wrongful dismissal of an atrocious assault and battery complaint which resulted from a fight in a tavern in Egg Harbor City on March 17, 1968. The false swearing counts in the indictment stem from the appearance of the defendant before the grand jury on November 8, 1972.

fendants' motion, under Rule 12(b)(6) F.R. Civ. P., to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court held an evidentiary hearing on the motion for a preliminary injunction, and made limited findings of fact. The appeal was argued before a panel of this court on September 7, 1973. Deeming the issues raised to be substantial, the trial on the challenged indictment being scheduled to commence on September 10, 1973, and the Attorney General of New Jersey declining to postpone it until the panel could decide the case, the panel entered an order enjoining the prosecution until such time as the appeal could be decided. Panel opinions were filed on September 10 reversing and remanding for further proceedings. Thereafter, representing that the State was willing to delay plaintiff's trial until disposition of the application for rehearing, the state attorney general petitioned for rehearing. Based on that representation, we recalled our mandate on September 21, 1973. Rehearing was granted before the panel; supplemental briefing was ordered on certain issues suggested by the appeal which had not been previously briefed or argued; and the panel subsequently granted some relief, one judge dissenting. Because of important federal-state comity questions, the full court subsequently agreed to hear the case in banc.

II.

Plaintiff-appellant Helfant, a member of the New Jersey bar and a former municipal court judge of that state, alleged in a verified complaint that he had been advised that he was the target of a state grand jury investigation into an alleged withdrawal of a criminal charge of

atrocious assault and battery. Armed with this information, and asserting a Fifth Amendment privilege, Helfant refused to testify when he first appeared before the state grand jury on October 18, 1972. He was subsequently subpoenaed to appear again before the grand jury on November 8, 1972, which was then sitting at the Trenton State House Annex on the same floor as the chambers of New Jersey State Supreme Court justices. Helfant was also directed to appear before the justices of the Supreme Court in their private chambers 10 minutes before his scheduled re-appearance before the grand jury.

The complaint averred that upon his appearance in the Supreme Court chambers, several justices asked questions about the subject matter of the grand jury investigation, including matters not then made public and also including inquiries concerning certain witnesses who has testified against Helfant before the grand jury.[2]

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[2] Helfant's complaint avers:

He was questioned by the Chief Justice [Weintraub] and Associate Justice Sullivan in the presence of the Court. The Chief Justice inquired of the defendant whether he thought a Judge should invoke the Fifth Amendment. Justice Sullivan asked what the plaintiff's feelings were about a Judge sitting in judgment of other people while he himself was invoking the Fifth Amendment before a Grand Jury. He also asked plaintiff if he had sat as a Judge since invoking the Fifth Amendment. Chief Justice Weintraub and another Justice also asked of plaintiff some question about his son's Bar Mitzvah, which matters were contemporaneously being considered by the State Grand Jury, including seating arrangements and who paid for the liquor. These questions also concerned an Abe Schusterman, who was a State's witness against

(Footnote continued on following page)

His complaint averred that "[a]fter . . . [he] left the Supreme Court chambers, he was in a state of confusion and bewilderment and had to go immediately before the State Grand Jury. * * * As a result of these questions, [by justices of the Supreme Court,] the plaintiff, whose previous counsel-advised intentions and will were completely discarded and overcome and who was quite emotionally upset by the confrontation, indicated to the Justices that he would indeed waive his Fifth Amendment privilege and testify in full before the State Grand Jury, fearing not only the loss of his Judgeship, but his accreditation as a member of the bar as well."

Helfant also averred that Deputy Attorney General Hayden, conducting the grand jury investigation, entered

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the plaintiff and who had appeared before the State Grand Jury. The Chief Justice also questioned plaintiff about Atlantic County Judge Thomas Rauffenbart and about an ice-making machine that was involved in an alleged pay-off in a criminal case involving Abe Schusterman, all of which matters were then being considered and investigated by the State Grand Jury which was being conducted by the defendant Joseph A. Hayden, Jr. under the direction of Attorney General George F. Kugler.

The questions posed to the plaintiff by the Justices of the Supreme Court were in connection with matters then being considered by the State Grand Jury. There had been no public release of these matters, particularly the Bar Mitzvah, seating arrangements thereat, arangements for the liquor and the gift of an ice machine. These matters had to be a portion of the raw evidence then being considered by the State Grand Jury and released and given to the Supreme Court during the pendency of the Grand Jury proceedings by defendant Deputy Attorney General Joseph A. Hayden, Jr., who was conducting the Grand Jury investigation.

the Supreme Court chambers after plaintiff left and that Hayden had also preceded the plaintiff into the chambers.

Finally, his complaint alleges:

> 14. As a result of the intrusion by the Deputy Attorney General and the disclosure to the Supreme Court of factual matters involved in a Grand Jury investigation during pendency of that investigation, and because of the intrusion of the New Jersey Supreme Court into the Grand Jury investigation and the communication between the Supreme Court of New Jersey and the Deputy Attorney General conducting the Grand Jury investigation, the plaintiff herein is made to suffer great, immediate, substantial and irreparable harm in that he must attempt to defend criminal charges brought in a State in which there has been prejudicial collusion directly affecting plaintiff, whether intentional or inadvertent between the Judicial and Executive branches of the New Jersey State government. Plaintiff is being made to defend criminal charges which have been obtained, inter alia, as a result of that collusion, and the deprivation of plaintiff's constitutional rights by not too subtle cooperative coercion on the part of the defendants. Furthermore, in the event of his conviction upon any one of the charges presently pending against him, plaintiff's only recourse would be review by the State Courts and ultimately the New Jersey Supreme Court, which court he has alleged has been involved in the prosecution of the charges against him.

At the injunction hearing Helfant presented the testimony of Patrick T. McGahn, one of his attorneys, and tes-

tified himself. Relevant testimony by Helfant is set forth in the margin.[3]

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[3] Q. What was your intention with regard to appearing and testifying before the State Grand Jury on that date before you arrived at Trenton?

A. Well actually I had no intention, Mr. Perskie, because Mr. Sullivan had said something about immunity and I had already invoked the Fifth Amendment and I didn't intend to testify about anything. I asked you in the car what are they going to give me immunity for?

• • •

Q. Were they sitting in their robes?

A. Yes, sir, I think they were; yes, sir.

Q. Now what happened when you came in?

A. I walked in and without any good mornings or anything else, the Chief Justice asked me if I thought it right for a Judge to invoke the Fifth Amendment.

• • •

Q. And what was your state of mind and your feelings as you entered those Chambers?

A. Well Mr. Perskie, I couldn't understand why they wanted me on such short notice, five minutes or ten minutes before the Grand Jury hearing and I was scared.

Q. Now you said the Chief Justice said something to you. Relate the conversation that took place as nearly as you can?

A. The Chief Justice asked me if I thought it right for a Judge to invoke the Fifth Amendment? And I said, Mr. Chief, before I can answer that I'd like to explain. He said, I don't want to get into the merits. I just want you to answer the question. And I said, well the answer to your question is no, I don't think it right; but I said, I would like to explain; and he said, no explanation is necessary.

Q. Was there any other conversation?

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By oral opinion the district court denied preliminary injunctive relief on the ground that *Younger* v. *Harris, supra,* precluded federal intervention. It also dismissed

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A. Mr. Justice Sullivan, who had just been appointed and I recognized him, I never met Justice Sullivan before; asked me if I had sat in the Municipal Court since I had invoked the Fifth Amendment; and I told him I had sat once in Somers Point; and he then asked, do I think it right to sit in judgment of other people when I myself had invoked the Fifth Amendment and refused to answer certain questions that were posed to me.

Q. What did you respond?

A. I then tried to tell Justice Sullivan about the three convicts and the reports that I had had of what they were saying and I felt that the only way I could protect myself, and the Chief Justice then said, we do not want to get into the merits; and I was cut off from saying any more. The Chief Justice then began to ask me about an ice maker that I was suppose to have purchased for Judge Rauffenbart and I told him I had purchased one and I had a receipt for it and cancelled check; and he then began to inquire about this fellow Schusterman and was Schusterman at my son's Bar Mitzvah and I tried to explain how he happened to be there, that he supplied the novelties and the favors. The Chief Justice asked me about the seating arrangements for the Bar Mitzvah and then he asked me who had purchased the liquor for the Bar Mitzvah, whether Mrs. Schusterman was there and whether I had purchased any other gifts for Judge Rauffenbart. He asked if formal invitations were sent out. It was basically things pertaining to Abe Schusterman who I had known had testified on the 25th of October, one week before.

Q. Now was there any file in the presence of the Chief Justice?

A. There was a file in front of the Chief Justice, Mr. Perskie, but it was closed and it was with the same brown folder that was

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the complaint for failure to state a claim for which relief can be granted. In the posture in which this case is before us, the district court has ruled only on the legal sufficiency of the complaint, pursuant to the Rule 12(b)(6) motion. "Findings of fact . . . are unnecesary on decisions of motions under . . . [Rule 12]. . . ." Rule 52(a), F.R. Civ. P. Although an evidentiary hearing on the injunction request was conducted, and the court made limited findings thereon, it did not find facts with respect to the merits of Helfant's § 1983 claim. Thus, there have been no fact-findings on the crucial issue of whether Helfant's testimony before the grand jury was the product of his free and unconstrained will. *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 225 (1973); *Haynes* v. *Washington,* 373 U.S. 503, 514 (1963).

"Since *Chambers* v. *Florida,* 309 U.S. 227, . . . [the Supreme] Court has recognized that coercion can be mental as well as physical. . . ." *Blackburn* v. *Alabama,* 361

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submitted to you by Mr. Hayden in your request with the clasp on the top of it. I don't absolutely recall Mr. Perskie, everything that went on in front of the Supreme Court.

Q. How long would you say you were totally, the total time you were before the Court?

A. It wasn't longer than ten of twelve minutes, Mr. Perskie.

Q. And when you came out—

A. Well, there was one other question the Chief asked me and I think it was the tone, when he said, what do you intend to do today?

Q. And what did you tell him?

A. I said, Mr. Chief Justice, I am going to testify.

N.T. 22-26.

U.S. 199, 206 (1960). "When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal." *Watts* v. *Indiana,* 338 U.S. 49, 53 (1949). The decision must be freely as well as rationally made. *Blackburn* v. *Alabama, supra,* 361 U.S. at 208.

III.

Because we are reviewing a Rule 12(b)(6) dismissal order, we must take as true Helfant's allegations that his testimony before the grand jury was not the product of a free and unconstrained will and that he is about to be tried on an indictment containing charges emanating from that coerced testimony.

Younger v. *Harris, supra,* 401 U.S. at 53, holds that a federal court should not enjoin a pending state prosecution in the absence of a showing of bad faith, harassment or other "extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment." *See, Lewis* v. *Kugler,* 446 F.2d 1343 (3d Cir. 1971); *Conover* v. *Montemuro,* 477 F.2d 1073, 1080 (3d Cir. 1973). Neither the Supreme Court nor this court has considered what extraordinary circumstances will justify federal intervention in a pending state prosecution. But the predicate of *Younger* v. *Harris* is an assumption that defense of the pending state prosecution affords an adequate remedy at law for the vindication of the federal constitutional right at issue. Thus, invocation of the "extraordinary circumstances" exception must bring into play the suggestion of an inability of the state forum to afford an adequate remedy at law.

By his complaint, plaintiff alleges that he was coerced by members of the State Supreme Court into relinquishing his Fifth Amendment right not to testify before the grand jury. He asserts that he then did testify, and that, as a result, he was indicted because of his allegedly coerced testimony. Helfant also avers that a New Jersey trial court has declined his motions to dismiss indictments emanating therefrom, on the grounds that they were based on his coerced testimony. *See, e.g., United States* v. *Calandra,* — U.S. — (42 U.S.L.W. 4104, January 8, 1974).

Under the unusual circumstances of this case, can it be said that the appellant may not vindicate his constitutional rights by a defense in "a single criminal prosecution"? Otherwise stated, do the administrative powers of the New Jersey Supreme Court, in the factual complex giving rise to appellant's constitutional claims, threaten his opportunity for the vindication of his federal rights in the New Jersey state court system? Thus our analysis requires an examination of the "power parameters" of the New Jersey Supreme Court.

IV.

The New Jersey Constitution provides: "The Chief Justice of the Supreme Court shall be the administrative head of all the courts in the State." Article VI, § 7, Par. 1. "The Chief Justice of the Supreme Court shall assign Judges of the Superior Court to the Divisions and Parts of the Superior Court, and may from time to time transfer Judges from one assignment to another, as need appears. Assignments to the Appellate Division shall be for terms fixed by Rules of the Supreme Court." Article VI, § 7, Par. 2.

"Thus this court is charged with responsibility for the overall performance of the judicial branch. Responsibility for a result implies power reasonably necessary to achieve it. More specifically, the power to make rules imports the power to enforce them." *In re Mattera,* 34 N.J. 259, 168 A.2d 38, 45 (1961).

"The constitutional administrative power is absolute and unqualified, and our Supreme Court has characterized it as the "plenary responsibility for the administration of all courts in the State.' State v. De Stasio, 49 N.J. 247, 253, 229 A.2d 636, 639, cert. den. 389 U.S. 830, 88 S.Ct. 96, 19 L.Ed.2d 89 (1967). See in re Mattera, 34 N.J. 259, 271-272, 168 A.2d 38 (1961). See also N.J. Const., Art. XI, § IV, par. 5; *cf.* N.J. Const., Art. VI, § VII, par. 1. Additionally, compare Kagan v. Caroselli, 30 N.J. 371, 379, 153 A.2d 17, 21 (1959), wherein the court observed that '[t]he Constitution places the administrative control of the municipal court in the Supreme Court and the Chief Justice. Art. VI, § 2, par. 3; Art. VI, § 7, par. 1. There is no room for divided authority.'

"The intent of the 1947 Constitutional Convention was to vest the Supreme Court with the broadest possible administrative authority. Conceptually, such authority encompasses all facets of the internal management of our courts. *Cf. Mattera, supra,* 34 N.J. at 272, 168 A.2d 38. This was made clear by the Committee on the Judiciary which considered it a fundamental requirement that the courts be vested with 'exclusive authority over administration.' 2 Proceedings of the Constitutional Convention of 1947, at 1180, 1183." *Lichter* v. *County of Monmouth,* 114 N.J. Super., 276 A.2d 382, 385-386 (1971).

Thus, it becomes readily apparent that the Supreme Court of New Jersey is more than an appellate court. Its "constitutional administrative power is absolute and unqualified." The Chief Justice "may from time to time transfer Judges from one assignment to another." The Supreme Court may assign judges to the Appellate Division for terms fixed by its own rules. The Supreme Court is vested with formidable supervisory and administrative power extending not only to the trial court level but to the Appellate Division as well.

The posture of this case, requiring that we assume that the allegations charging coercion by the Supreme Court are true, the next question appears to be whether the appellant may vindicate his constitutional rights in this case in a state court system which functions under the "absolute and unqualified" administrative power of its highest court.

V.

Distilled to its essence, appellant's argument is that the factual involvement of the New Jersey Supreme Court would destroy the objectivity of the entire state court system in processing his constitutional claim. But the schema of judicial review of federal constitutional questions presented in the state cases is not confined to the state court system. If convicted, and if persuaded that principles of federal constitutional law were not properly applied in the state system, Helfant will have the opportunity of applying for certiorari to the United States Supreme Court, 28 U.S.C. § 1257(3), and if given a custodial sentence, will have the additional right to apply to a

federal forum for federal habeas corpus relief, 28 U.S.C. § 2254.

What complicates this particular case, however, is that the resolution of Helfant's specific contention will not be confined to interpreting, refining, or defining principles of constitutional law. Critical to the eventual constitutional interpretations is the threshold determination of whether Helfant's testimony before the grand jury was the product of a free and unconstrained will. This is not a question of law. It is a question of fact—narrative or historical facts as to what occurred and operative or constitutional facts as to the voluntariness of his actions. *Schneckloth* v. *Bustamonte, supra,* 412 U.S. at 227. And some fact-finder must decide these.

We have not been directed to, nor has our research disclosed, any procedure by which this factual determination may be made by a jury. In New Jersey criminal law procedures, as is the case in federal practice, ultimate facts found by criminal court juries are merely verdicts of guilty or not guilty. The factual determination of the "free and unconstrained will" question within the state system will be made by a New Jersey state judge, a state judge subject to the "absolute and unqualified" administrative power of the Supreme Court, whose findings are presumably reviewable by an Appellate Division, assignment to which shall be by terms fixed by the rules of the Supreme Court, with a possibility of ultimate review by the New Jersey Supreme Court itself.[4] Thus, the New

[4] The New Jersey Supreme Court has set forth in detail the scope of appellate review of facts found by a trial judge: "There

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Jersey state court system would play an important role in both the fact-finding process and the review thereof, although upon acceptance of certiorari, "it is . . . [the U. S. Supreme Court's] duty . . . to examine the entire record and make an independent determination of the ultimate issue of voluntariness." *Davis* v. *North Carolina,* 384 U. S. 737, 741-742 (1966).

A litigant has come into a federal court asking for a vindication of a federal constitutional right which is critically dependent upon a finding arising out of circumstances in which six or seven members of the New Jersey Supreme Court as then constituted are alleged to be directly involved. If denied federal relief, appellant will be restricted to a judicial procedure in which the resolution or modification of factual determinations would be com-

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can be no doubt of the *power* of the appellate tribunals of this State . . . to review the fact determinations of a trial court in all cases heard without a jury and to make new or amended findings. * * * The aim of . . . review . . . is . . . to determine whether the findings could reasonably have been reached on sufficient credible evidence present in the record. * * * But if the appellate tribunal is thoroughly satisfied that the finding is clearly a mistaken one and so plainly unwarranted that the interests of justice demand intervention and correction . . . then, and only then, it should appraise the record as if it were deciding the matter at inception and make its own findings and conclusions." *State* v. *Johnson,* 42 N.J. 146, 199 A.2d 809, 816-818 (1964). *See also, State* v. *Yough,* 49 N.J. 587, 231 A.2d 598, 602 (1967); *State* v. *Daly,* 126 N.J. Super. 313, 314 A.2d 371, 373 (1973). The Supreme Court, in reviewing the decision of the Appellate Division, may itself deem it appropriate to conduct a *de novo* review. *State* v. *Johnson, supra,* 199 A.2d at 818.

mitted to a court system under the administrative supervision of the participants in the factual complex. This presents an extremely awkward position.

VI.

To determine whether there should be an exercise of even limited federal judicial power under these circumstances requires a brief review of those fundamental principles which govern federal-state relations. Initially, the federal courts have subject matter jurisdiction of an action commenced by a person "[t]o redress the deprivation, under color of any State law . . . custom or usage, of any right, privilege or immunity secured by the Constitution of the United States. . . ." 28 U.S.C. § 1343(3). Congress has afforded Helfant a remedy to bring "an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. And the Supreme Court has held that this may be by means of injunction, *Mitchum* v. *Foster,* 407 U.S. 225 (1972), or by declaratory judgment, *Steffel* v. *Thompson,* — U. S. — (42 U.S.L.W. 4357, March 19, 1974).

In the sensitive and delicate area of federal-state relations, where the power of government is divided between a federation and its member states, there is no constitutional barrier, and since *Mitchum* v. *Foster, supra,* no absolute Congressional barrier, to federal court intervention in state criminal proceedings.

"The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts

only in obedience to Congressional legislation in conformity to the judicial Article of the Constitution. Congress, by its legislation, has adopted the policy, with certain well-defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved." *Douglas* v. *City of Jeannette,* 319 U.S. 157, 162-163 (1943).

In *Stefanelli* v. *Minard,* 342 U.S. 117, 120 (1951), Mr. Justice Frankfurter emphasized that this policy of federal court restraint is based on "[t]he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law. . . ." "Regardless of differences in particular cases, however, the Court's lodestar of adjudication has been that the statute [Civil Rights Act] 'should be construed so as to respect the proper balance between the States and the federal government in law enforcement.' *Screws* v. *United States,* 325 U.S. 91, 108." *Ibid.,* at 121.[5]

Mr. Justice Black would emphasize in *Younger* v. *Harris, supra,* 401 U.S. at 44: "This underlying reason for restraining courts of equity from interfering with criminal

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[5] "Mr. Justice Holmes dealt with this problem in a situation especially appealing: 'The relation of the United States and the Courts of the United States to the States and the Courts of the States is a very delicate matter that has occupied the thoughts of statesmen and judges for a hundred years and cannot be disposed of by a summary statement that justice requires me to cut red tape and intervene.' Memorandum of Mr. Justice Holmes in V. Sacco/Vanzetti Case, Transcript of the Record (Henry Holt & Co., 1929) 5516." *Ibid.,* 342 U.S. at 124-125.

prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."

Thus, federal judicial policy against intervention in state criminal proceedings is bottomed on an unwillingness for federal *disturbance* of "the notion of 'comity', that is, a proper respect for state functions," state institutions, and especially, state court systems. We now proceed to determine whether some minimum exercise of federal authority in these proceedings will *disturb* or whether it will *implement* this proper respect for state functions.

VII.

So posited, we reject appellant's basic contention that he is entitled to a federal order permanently enjoining the prosecution of the indictments. "[C]ourts of equity in the exercise of their discretionary powers should . . . [refuse] . . . to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; and equitable remedies infringing this independence of the states—though they might otherwise be given—should be withheld if sought on slight or inconsequential grounds." *Douglas* v. *City of Jeannette, supra,* 319 U.S. at 163. In the context of permanently enjoining the state prosecution, we do not find bad faith or harassment, *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), nor do we find this to be one of those "exceptional cases," *Douglas* v. *City of Jeannette, supra,* or "extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment." *Younger* v. *Harris, supra,* 401 U.S. at 53. We have not been persuaded that Helfant will be precluded from asserting constitutional rights in his defense of a single criminal proceeding. *Younger* v. *Harris, supra.*

We find no reason to depart from the formidable general policy of "leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this [Supreme] Court of any federal questions involved." *Douglas* v. *City of Jeannette, supra,* 319 U.S. at 163.

The considerations which militate against granting a permanent injunction against the conduct of the state trials do not surface, however, when considering the limited relief of a federal declaratory judgment as to whether Helfant's testimony before the grand jury was the product of his free and unconstrained will. If limited federal intervention is permitted, the state court system will ultimately be free to conduct the trials and appeals, if any, as an independent judiciary, free from any interference.

Since Helfant has a statutory right to have a claim for declaratory relief adjudicated in the federal courts, and will be denied the opportunity to be heard only if there is a threat to the delicate structure of comity between the federal and state systems, our next task is to examine the effect of limited federal fact-finding under these highly sensitive circumstances.

Judges in a free society regard even the appearance of a biased decision as more harmful than a result they personally disapprove. Lord Herschel's remark to Sir George Jessel comes to mind: "Important as it was that people should get justice, it was even more important that they should be made to feel and see that they are getting it."[6]

In the context of this highly unusual factual complex, it is critical that traditional respect for an outstanding state court system be nurtured, preserved, and supported; that the state court process this indictment without the

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[6] R. Pound, *Mechanical Jurisprudence,* 8 COLUM. L. REV. 605, 606 (1908).

slightest suggestion that it is unable to perform its function without total objectivity, or that there be even the appearance of any infirmities. Federal court action which seeks to guarantee such an appearance and which bolsters and enhances the reputation of a state court system does not denigrate comity. Indeed, it supplies a positive affirmation of the high respect the court system of one sovereign extends to that of another. To order federal fact-finding within an extremely narrow compass, under these circumstances, comports with, rather than offends, the mutual relationship poignantly described by Justice Black as "Our Federalism."

Such limited use of authorized power will free the New Jersey court system of any suggestion that a fact-finding on the voluntariness issue by a trial judge in this case would be influenced, consciously or unconsciously, by the "brooding omnipresence" of the New Jersey Supreme Court. At the same time if the case proceeds to a state appellate level, judges of the reviewing courts will be able to adjudicate any federal constitutional questions with maximum freedom. Moreover, if the case should proceed to the New Jersey Supreme Court, that court will not be placed in an untenable situation of being a court of review as to findings of facts in which they are allegedly participants.

We are persuaded that there will be total "sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger* v. *Harris, supra,* 401 U.S. at 44.

Thus, by a federal resolution of this limited issue, the factual predicate of the appellant's federal claim will be resolved in the federal forum and, at the same time, the state will be completely free to proceed with the state prosecution and therein to vindicate appellant's constitutional rights.

Such limited declaratory relief does not have the force of an injunction, *Younger* v. *Harris,* or a declaratory judgment couched in such terms as would have "virtually the same practical impact as a formal injunction would." *Samuels* v. *Mackell,* 401 U.S. 66, 72 (1971). The use of the declaratory judgment here fits in precisely with the exception articulated by Mr. Justice Black in *Samuels* v. *Mackell,* 401 U.S. at 73: "There may be unusual circumstances in which an injunction might be withheld because, despite a plaintiff's strong claim for relief under the established standards, the injunctive remedy seemed particularly intrusive or offensive; in such a situation, a declaratory judgment might be appropriate and might not be contrary to the basic equitable doctrines governing the availability of relief."

We are quick to recognize that it may be contended that even such limited federal intervention in a state criminal proceeding would set an unwholesome precedent. Because of the high incidence of judicial fact-finding in pretrial hearings ancillary to state prosecutions, it can be envisioned that wholesale resort to this technique would be attempted. We are persuaded that any precedential value to our holding is miniscule. The factors which prompt our decision also limit its precedential value. First, perforce, the operative facts are limited to the State of New Jersey, where its constitution vests in the Chief

Justice and the state's highest court the total and complete administrative control over judges of the trial level and appellate division. Second, this case alleged involvement by the Supreme Court with a municipal court judge, who allegedly was the target of state grand jury proceedings and who was summoned to appear before the Supreme Court minutes prior to a scheduled grand jury appearance. Third, it is alleged that prior to such appearance before the state's highest court, Helfant had resolved to invoke the Fifth Amendment before the grand jury and that questioning by the Supreme Court appearance so unnerved him that he was unable to exercise a totally free will. Absent presence of these factors we see no future case receiving much precedential nourishment from the decision we reach today.[7]

Accordingly, the order dismissing the complaint will be reversed. The order denying the motion for a preliminary injunction will be vacated and the case will be remanded to the district court for the entry of an order temporarily enjoining the trial of Indictment No. SGJ-10-72-10 in the New Jersey courts until completion of the proceeding in the district court,[8] unless the State of New

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[7] There was some suggestion that this court should construe the New Jersey public employee immunity statute, N.J.S.A. 2A:81-17.2a2 in the context of Helfant's grand jury appearance. The litigants agree that this statute is not applicable since Helfant's presence before the grand jury was not associated with his role as a municipal court judge, but as a private attorney.

[8] "A court of the United States may . . . grant an injuction to stay proceedings in a State court . . . where necessary in aid of its jurisdiction . . . ." 28 U.S.C. § 2283.

Jersey stipulates to a postponement thereof. The district court proceeding shall be limited to a determination of whether Helfant's testimony before the state grand jury on November 8, 1972, was the product of a free and unconstrained will. It shall issue a declaratory judgment setting forth its conclusions. We direct that the trial be commenced forthwith, and that the district court shall make findings of fact and conclusions of law within thirty days from the issuance of the mandate of this court. The mandate of this court shall issue forthwith.

ADAMS, *Circuit Judge,* dissenting

The majority, while conceding that this case presents "a delicate question of federal-state comity," resolves that question by sanctioning federal interference in an ongoing state criminal proceeding. Warrant for this interference is purportedly found in the "extraordinary circumstances" exception to the anti-injunctive strictures of Younger v. Harris.[1] I conclude that this case, unusual as its facts may be, provides no occasion for casting aside the interwoven precepts of federalism and equitable jurisdiction that combine to make up the *Younger* doctrine of non-intrusion. Accordingly, I dissent.

The majority's exposition of the rule of *Younger* is fair: a federal court may not interfere in an ongoing state criminal proceeding[2] absent a showing of prosecutorial bad

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[1] The term "anti-injuctive" is, of course, shorthand for the notion that *any* federal interference in ongoing state criminal proceedings, be it by injunction, declaratory judgment, or otherwise, is to be disfavored. *See* Samuels v. Mackell, 402 U.S. 66 (1971).

[2] *Compare* Steffel v. Thompson, 14 Cr. L. Rep. 3123 (U.S., Mar. 19, 1974).

faith or harassment, or other "extraordinary circumstances." It is conceded that neither bad faith nor harassment are present in Helfant's prosecution.[3] Rather, the majority holds that the alleged involvement of the New Jersey Supreme Court in Helfant's prosecution embodies an "extraordinary" situation.

What the majority appears to overlook is that *Younger*, while setting out a nucleus of rules, did more. It expressed a spirit. Though some of the historical antecedents of the *Younger* decision undoubtedly extend further,[4] the first formal expression of the *Younger* spirit in federal law came in 1793, when Congress imposed an absolute ban on federal injunctions issued "to stay proceedings in any court of a state."[5] Two apparent motives behind the statutory inhibition of the 1793 Act were to prevent encroach-

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[3] "Bad faith" and "harassment" signify, generally, that a prosecution is being brought or threatened with no reasonable hope or expectation of obtaining a valid conviction. *See Perez* v. *Ledesma*, 401 U.S. 82, 85 (1971).

[4] For example, the conflict between law and equity, particularly as embodied in the practice of equity of enjoining proceedings at law, extends back at least into the seventeenth century. *See* O. Fiss, Injunctions 12 (1972). Justice Frankfurther, speaking more particularly, stated "[t]he maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law." Stefanelli v. Minard, 342 U.S. 117, 120 (1951).

[5] 1 Stat. 335, the forebearer of 28 U.S.C. § 2283. *See* Note, *Anti-Suit Injunctions Between State and Federal Courts*, 32 U. Chi. L. Rev. 471, 480 (1965). The statutory ban is today subject to several clearly delineated exceptions. *See* Mitchum v. Foster, 407 U.S. 225 (1972).

ments by federal courts upon the then well-established state-court domain, and to codify the prevailing prejudices against extensions of equity jurisdiction and power.[6] One hundred and fifty years later the theme was repeated in Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.[7] There the anti-injunction statute was viewed as necessary, in part, to prevent needless friction between state and federal courts."[8] And only this term the Supreme Court reiterated its sensitivity "to principles of equity, comity, and federalism."[9]

Of course, the Supreme Court has recently acknowledged that section 1983, under which Helfant's suit has been brought, is a specific exception to the absolute interdictions of the anti-injunction statute.[10] Nonetheless, section 2283 expresses a "long standing public policy"[11] against federal interference in state proceedings. The emanations from that policy must thus be heeded even in a 1983 suit.[11a] Accordingly, the same considerations that un-

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[6] *See* C. Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345, 347 (1930); Toucey v. N.Y. Life Ins. Co., 314 U.S. 118, 131 (1941).

[7] 309 U.S. 4 (1940).

[8] *Id.* at 19.

[9] Steffel v. Thompson, *supra*.

[10] *See* Mitchum v. Foster, 407 U.S. 225 (1972).

[11] Younger v. Harris, 401 U.S. 37, 43, 46 (1971); Mitchum v. Foster, *supra*, 407 U.S. at 230.

[11a] *See* O'Shea v. Littleton, 414 U.S. 488, 499 (1974); Mitchum v. Foster, *supra*, 407 U.S. at 243.

derlay the 1793 Act and its successors—a respect for state sovereignty and "basic doctrine[s] of equity" which "restrain . . . equity jurisdiction within narrow limits" [12]—have been imported into our civil rights jurisprudence.

The prime vehicle of this importation is Younger v. Harris.[13] Supplemented by Samuels v. Mackell, *supra,* the *Younger* doctrine makes it clear that *only* prosecutorial bad faith or harassment, or "perhaps other extraordinary circumstances" [14] will justify federal intrusion, by way of injunction, declaratory relief or, as here, "federal fact-finding," into a state criminal proceeding. The doctrine is not hortatory. Given the policies incarnate in the *Younger* rule, it would appear that we should sanction interference under the "extraordinary circumstances" exception only when absolutely satisfied that neither "comity" nor equitable principles of restraint will suffer. Analysis of Helfant's situation leaves me far from satisfied that such is the case here.

A. "Comity"

The concept of comity, though often invoked, tends to elude precise definition. Webster's dictionary offers a

[12] Younger v. Harris, *supra,* 401 U.S. at 43, 44.

[13] It must be noted that the Supreme Court, in *Younger,* emphasized that the anti-intrusive spirit adumbrated there was not a departure from the Court's prior decisions. *See,* e.g., Fenner v. Boykin, 271 U.S. 240 (1926); Douglas v. City of Jeannette, 319 U.S. 157 (1943); Dombrowski v. Pfister, 380 U.S. 479 (1965).

[14] Perez v. Ledesma, 401 U.S. 82, 85 (1971).

generic meaning—"mutual consideration between . . . equals." In the context of federal-state judicial relations, the meaning is more sharply etched. "Comity" is

> "a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state governments, and a continuance of the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways." [15]

Among the "state functions" of which a federal court should be particularly respectful is the administration of state criminal justice.[16] The recognition that administration of the criminal law is "intimately involved with sovereign prerogative" [17] should result in an extreme diffidence on the part of a federal court asked to intrude into the state criminal process. Diffidence may be dispelled where, as in cases of "bad faith" or "harassment," the criminal law is being utilized for other than its ordinary, legitimate purpose, or where the state is acting in flagrant disregard of the orderly processes of criminal justice. But when, as here, a criminal prosecution has been brought with the hope of obtaining a valid conviction,

[15] Younger v. Harris, *supra,* 401 U.S. at 44.

[16] *See* Railroad Comm'n v. Pullman, 312 U.S. 496, 500 (1941). *See also* Aldisert, *Judicial Expansion of Federal Jurisdiction,* 1973 Ariz. St. U.L.J. 557, 572 (1973).

[17] Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 30 (1959).

"comity" dictates that the federal courts indulge every presumption in favor of the state court's impartiality, orderliness and competence to decide federal questions.

While avowing its recognition of this notion of respect for state functions, the majority concludes that the presumption in favor of the state criminal justice system is punctured and deflated by the circumstances of this case. The majority's view distills to this: because the New Jersey Supreme Court exercises rather plenary "administrative power" over the lower state courts, and because certain of the Justices of the New Jersey Supreme Court itself were the alleged instrument of Helfant's "coercion," there is likelihood of partiality on the part of the state trial court that would, ordinarily, resolve the factual questions embodied in Helfant's Fifth Amendment claim.[18]

The erection and entertainment by this Court of the foregoing scenario, and its use as a justification for interfering in a state criminal proceeding, appears to me to be squarely in the teeth of the spirit of comity expressed in *Younger*. The scenario presumes for example, that the state trial judges act with a constant eye on the New Jersey Supreme Court, seeking not to apply the law fairly but to preserve or advance their own interests by a devious, obsequious scyophancy. It seems to postulate, further, that the New Jersey Supreme Court itself might be so venal and vindictive as to mete out some administrative

[18] Of the Justices that were on the New Jersey State Supreme Court at the time of the incident referred to in Helfant's complaint, only four remain as members of the Court, and more specifically the Chief Justice, who exercises the administrative supervision referred to in the majority opinion, has since retired.

"punishment" in the event that a trial court determined that Helfant had been "coerced." Finally, the majority's view overlooks what is the case in the federal system as well as in the states—that courts are sometimes asked to resolve controversies in which a party holds some power to affect adversely the very judges who are deciding the dispute.[19] In such instances, there is not imputed to the federal courts a hint of partiality. "Mutual respect among equals"—the generic definition of "comity"—would seem to demand, then, that no such imputation be made concerning the state courts either.

The majority, perhaps in recognition of the harsh light in which their decision might seem to cast the New Jersey courts, try to meliorate the implications of their opinion by speaking in terms of the mere "appearance" of a less than impartial state court process.

In sum, the majority's assertion that the possible "appearance of a biased [state] decision" warrants federal intrusion smacks of the federal high-handedness that section 2283 and *Younger* were fashioned to prevent. In my view, the spirit of comity, properly conceived and applied, would

[19] To cite an obvious example, federal courts quite often assess the constitutional validity of Congressional legislation. Congressmen, of course, may grant or withhold a salary increase to federal judges at any time. There thus exists something of an economic motivation for a federal judge to be less than impartial in reviewing federal legislation. Yet I do not think the probity of a federal court decision may be properly questioned on such basis.

be reason enough to reject Helfant's plea for federal relief at this stage of the controversy.[20]

B. "Great and Immediate" Harm

A crucial aspect of *Younger's* limitation upon incursions into state proceedings is the concept that federal interference may be sanctioned, if at all, only when the alleged unconstitutional harm will be "both great and immediate."[21] This teaching has its genealogy in traditional precepts of equitable restraint.[22] A consideration of the facts of the present dispute shows that, even were

[20] Only recently, a three-judge federal district court sitting in New Jersey rejected the notion that the New Jersey state courts are incapable of fairly adjudicating issues implicating their own state Supreme Court. In American Trial Lawyers Ass'n. v. New Jersey Supreme Court, No. 64-72 (D. N.J., June 20, 1972), where there was attacked by a bar association a rule promulgated by the Supreme Court setting forth the ground rules for contingent fees, the district court in rejecting the complaint stated:

> "Rather [plaintiffs] emphasize that by leaving [their claims] to the state courts they ultimately must have their cause decided by the same body which took the action they attack. Admittedly, this is so. Nevertheless, we cannot conclude that the state courts will listen with deaf ears to plaintiffs' challenge simply because plaintiffs attack the rulemaking authority of the State Supreme Court."

[21] Younger v. Harris, *supra*, 401 U.S. at 46; Fenner v. Boykin, *supra*, 271 U.S. at 243.

[22] Fletcher v. Bealey, 28 Ch. 688 (1885). *See* Story, Equity Jurisprudence 377 (1919).

it the case that Helfant had been "coerced" into testifying, any harm resulting from that coercion would not be "immediate"—a *sine qua non* of federal relief.

The majority, having correctly determined that there is no basis in law for an outright injunction against Helfant's prosecution, concludes that if the facts are as Helfant alleges, declaratory relief should issue to the effect that the "coerced" testimony may not be introduced at Helfant's trial. The edict thus fashioned by the majority is bottomed on what is, at best, mere speculation that the state will in fact attempt to introduce against Helfant the testimony elicited from him at the grand jury hearing. At oral argument, counsel for the state represented to this Court that Helfant's grand jury testimony will be used, if ever, *only* to impeach any inconsistent statements Helfant might utter should he take the witness stand.[23] The

[23] The colloquy at oral argument between the Court and counsel for New Jersey was as follows:

> Judge Aldisert: Is the state representing to this federal court that it does not intend to and will not use the testimony elicited from the plaintiff at the grand jury proceeding?
>
> A. At this time there is no present intention of using that testimony. But were the appellant to take the stand, were his testimony to deviate in strong terms, that testimony then, of course, under Harris v. New York, might well be . . . .
>
> Judge Aldisert: . . . [N]ow we do not have as strong a position that I thought we had a minute ago.
>
> • • •

(Footnote continued on following page)

"harm" that the majority's decision seeks to avert is thus conjectural, depending for its very existence upon events that may never occur. Consequently, the majority's result tends to ignore or flout the "great and immediate" requirement.

Another point should be mentioned briefly here. Helfant was indicted for three "substantive" offenses,[24] as well as for false swearing before the grand jury. Insofar as the false swearing counts are concerned, it would appear that Helfant's grand jury testimony will be admissible in evidence in any event, even if it should be determined that that testimony was "coerced." The Supreme Court, and this Court as well, have held that the Fifth Amendment does not confer upon a witness the privilege to lie while under oath.[25] Thus, though "coerced" testi-

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(Footnote continued from preceding page)

JUDGE ALDISERT: The question now comes if the plaintiff is not entitled to federal court protection of an asserted constitutional right at this time, at what time could he possibly have federal protection if an issue at stake is the possible bias of a state court system?

A. Were the state to seek to introduce the grand jury testimony as a declaration against penal interests, for the purpose of argument, perhaps the appellant might have standing to come into this Court.

[24] The three "substantive" state offenses with which Helfant is charged are conspiracy, obstructing justice, and aiding in the compounding of a crime.

[25] *See* United States v. Knox, 396 U.S. 77 (1969); Glickstein v. United States, 222 U.S. 139 (1911); United States v. Hockenberry, 474 F.2d 247 (3d Cir. 1973). *See also* United States ex rel. Annuziato v. Deegan, 440 F.2d 304 (2d Cir. 1971).

mony may not be used to establish Helfant's commission of "substantive" offenses, it would appear that the state may use it to prove that he swore falsely.

The majority's disregard of the "great and immediate" limitation thus emerges in sharp focus. There is no reasonable assurance that Helfant's grand jury utterances will *ever* be introduced at trial of the substantive counts, and there is a positive indication that Helfant can suffer no unconstitutional harm at all by introduction of his testimony at trial of the false swearing counts. The equitable doctrine that harm must be imminent before an injunction will issue against a state criminal proceeding—a precept whose substance is an integral part of the doctrine of federal non-intrusion—is, therefore, disregarded by the result the majority reaches.[25a]

C. "Irreparable Injury" and "Adequate Remedy at Law"

Among the central limiting principles of equity jurisprudence is the maxim that equity will act only when there is no adequate remedy at law.[26] This notion, too, has its roots in the historical bifurcation—and the resultant conflict—between courts of law and of equity.[27] The requirement that a plaintiff show "irreparable injury" before an injunction will issue is but an alternative statement of the "adequate remedy" rule.

Younger emphasizes that the "adequate remedy" rule is to be given rigorous application when a federal court is

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[25a] *See* O'Shea v. Littleton, *supra*, 414 U.S. at 498.

[26] O. Fiss, Injunctions 9 (1973).

[27] *Id.* at 12. *Cf.* Story, Equity Jurisprudence 375-80 (1919).

asked to interfere in an ongoing state criminal proceeding. Mere allegations of unconstitutionality will ordinarily not suffice to justify intrusion into a state criminal trial:

> "Certain types of injury, in particular the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves, be considered 'irreparable' in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution."[28]

Even prior to *Younger*, the Supreme Court had explained in forceful language, why challenges to certain types of unconstitutionality would not ordinarily support federal interruption of a state criminal trial. First, the state criminal process is presumed to be an "adequate" channel for vindicating federal rights. Second, if federal relief were granted in the midst of a state criminal proceeding,

> "[e]very question of procedural due process of law —with its far flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum . . . to determine the issue. Asserted unconstitutionality in the impanelling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities . . . to subvert the orderly, effective prosecution of local crime in local courts."[29]

[28] Younger v. Harris, *supra*, 401 U.S. at 46; *see also* Watson v. Buck, 313 U.S. 387, 400 (1941).

This exposition by the Supreme Court of the underpinnings of the adequate remedy doctrine makes plain that, besides honoring tenets of equitable restraint, the adequate remedy rule advances and protects the concept of federal-state comity. The requirement that there be no adequate remedy at law is thus strengthened by *Younger's* explicit and implicit re-invigoration of "a proper respect for state functions."[30]

The sanctioning of federal relief at this stage of Helfant's prosecution practically undermines the "adequate remedy" precept. What Helfant seeks, and what the majority would permit, is a federal declaration in the middle of a state criminal trial to the effect that certain evidence was unconstitutionally obtained, and so is inadmissible in the state court. To my mind, this situation so

[29] Stefanelli v. Minard, 342 U.S. 117, 123-24 (1951) (footnotes omitted); *see also* Clearly v. Bolger, 371 U.S. 392, 397 (1963).

[30] 401 U.S. at 44. It is significant to note that Justice Brennan, writing for the majority in Dombrowski v. Pfister, *supra*, 385 U.S. at 485 n.3, adverted to a situation closely analogous to that presented in this case. He said:

> "It is difficult to think of a case in which an accused could properly bring a state prosecution to a halt while a federal court decides his claim that certain evidence is rendered inadmissible by the Fourteenth Amendment."

closely resembles that adverted to in *Stefanelli, supra,* that there is little justification for denominating this an "extraordinary situation" and shelving the restraints on our remedial powers. A criminal prosecution, followed by appeal and petition for certiorari, is presumed to be an adequate remedy for the constitutional deficiencies Helfant alleges. The "inadequacy" the majority perceives is, of course, the asserted involvement of the New Jersey Supreme Court. However, as we have seen, that very claim of "inadequacy" is itself in derogation of the program of comity.

Moreover, there is an alternative federal remedy available to Helfant if the need for it should ever arise, a remedy which would provide an opportunity for the sort of "federal fact finding" adverted to by the majority. Yet, this alternative remedy—habeas corpus—would not cause so severe a wrench to federal-state relations as the one advanced by the majority. Should Helfant lose his Fifth Amendment claims in the state courts and receive a custodial sentence,[31] he may seek a writ of habeas corpus. The habeas statute would appear to require full federal fact finding on Helfant's "coercion" claim,[32] given the circumstances Helfant alleges.

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[31] *See* 28 U.S.C. § 2254; United States ex rel. Dessus v. Pennsylvania, 452 F.2d 557 (3d Cir. 1971), *cert. denied,* 409 U.S. 854 (1972).

[32] 28 U.S.C. § 2254(d) provides in part that in federal district courts, upon an application for *habeas,* prior state-court findings of fact "shall be presumed to be correct" unless:

(Footnote continued on following page)

Again, the dominant chord of *Younger,* requiring as it does that we pay scrupulous heed to the adequacy of state remedies and alternative federal remedies, appears to have been abridged by the majority's decision. And certainly, when the "adequate remedy" rule, the requirement of "great and immediate" harm, and the cardinal principle of comity are considered together, the sanctioning of federal interference in this case cannot be justified.

D. "Extraordinary Circumstances"

The assumption that there exists an "extraordinary circumstance" exception to *Younger's* interdiction is grounded in the language of the *Younger* opinion itself. There, the Supreme Court said:

> "There *may,* of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment."[33]

(Footnote continued from preceding page)

"(2) . . . the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing; or

"(6) . . . the applicant did not receive a full, fair, and adequate hearing in the state court proceeding; or

"(7) . . . the applicant was otherwise denied due process of law in the State court proceeding."

If Helfant is convicted by use of improperly procured evidence, his conviction thus could be set aside by such a finding by a federal district court.

[33] 401 U.S. at 53 (emphasis added).

But the Court immediately proceeded to point to an illustration of what such circumstances might be, quoting from Watson v. Buck:[34]

> "It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."[35]

No other delineation of the contours of the "extraordinary circumstances" exception has yet been undertaken by the Supreme Court. Indeed, scattered statements by the Court seem to indicate doubt on the part of some of the Justices that any such exception exists at all. Thus in Perez v. Ledesma,[36] for example, decided on the same day as *Younger*, Justice Black was willing to say only that "*perhaps* in . . . extraordinary circumstances where irreparable injury can be shown is federal . . . relief against pending state prosecutions appropriate."[37] And only recently, in *Allee* v. *Medrano*,[38] Chief Justice Burger, joined by two other members of the Court, offered a reading of *Younger* that seems to leave no room for any extraordinary circumstances exception:

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[34] 313 U.S. 387 (1941).

[35] *Id.* at 402.

[36] 401 U.S. 82 (1971).

[37] *Id.* at 85.

[38] — U.S. — (May 20, 1974).

> "To meet the Younger test the federal plaintiff *must* show manifest bad faith and injury that is great, immediate, and irreparable, constituting harassment of the plaintiff in the exercise of his constitutional rights, and resulting in a deprivation of meaningful access to the state courts."[39]

While it cannot be said that these statements affirmatively establish that there is no "extraordinary circumstances" exception, they do indicate that uncertainty exists concerning what circumstances, if any, will warrant federal intrusion under that circumscribed exception. Absent a clear benchmark to guide us in identifying "extraordinary circumstances," we should hew closely to the concepts of equitable restraint and comity, concepts which, after all, *Younger* was designed to preserve, protect and perpetuate.

E. Practical Considerations

Thus far, I have sought to point out how historical and doctrinal considerations weigh against a federal incursion into the midst of Helfant's state prosecution. But more is called for in this case than "a merely doctrinaire alertness to protect the proper sphere of the states in enforcing their criminal law."[40] A glance of pragmatics and at the realities of time and cost emphasize how damaging to federal-state relations the majority's decision may prove.

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[39] Slip opinion at 16 (Burger, C.J., concurring and dissenting).

[40] Stefanelli v. Minard, *supra*, 342 U.S. at 123.

Helfant was first subpoenaed to appear before the state grand jury in October of 1972. On January 17, 1973, an indictment was returned, charging Helfant with the commission of crimes that occurred as early as 1968. It has now been more than a year-and-a-half since New Jersey has been thwarted from proceeding with the prosecution because of the federal intervention sought by Helfant. During that time, a critical witness has died and the administration of the prosecutor's office has changed. The prospect now is for further delay, since "fact finding" has been ordered in the district court, and because there is the possibility of another appeal to this Court from the fact finding proceeding. It is, therefore, not unlikely that a two-year suspension in the state prosecution will result. A delay of such duration in a state criminal proceeding, sanctioned by a federal court, and predicated solely on a challenge to the admissibility of evidence—evidence that may never be offered—would certainly seem to be an "insupportable disruption."[41] This is particularly true in these times when special efforts are being made to expedite criminal proceedings.[42]

Looming large among the doctrinal premises of Younger, of section 2283, and of the recent proliferation of commentary justifiably decrying the "denigration of state courts,"[43] is the idea that, for our federal system to function as it ought, the states must be accorded a full measure of dignity, respect and confidence. When a federal court, on the occasion of a criminal defendant's objection to evidence, imposes a substantial impediment upon a state criminal trial, little is done to enhance the prestige of either court, state or federal.

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[41] *Id.*

[42] *See, e.g.*, Rule 50(b), Federal Rules of Criminal Procedure; ABA Project on Standards for Criminal Justice, Standards Relating to Speedy Trial (Approved Draft, 1968).

[43] Aldisert, *supra*, at 573.

What is at stake in this case is the need to strike a balance between the regimen of non-intrusion on the one hand, and a citizen's right to federal disposition of his federal claims on the other. The two are not irreconcilable. Helfant, under the view expressed in this dissent, could have his day in federal court by certiorari or by habeas. And, of course, by declining to permit federal interference now we would save to the state its sovereign prerogative to try an accused without delay. The majority's solution of the problem, however, disrupts and disdains the state process for no other reason than to assure Helfant of an *immediate* federal forum for a factual claim that may never ripen into controversy. Comity thus suffers, not in the interest of preserving intact the right to be heard in federal court, but solely as a guarantee that that right be vindicated *instanter*.

For all of the reasons set forth, I dissent, and would affirm the judgment of the district court.

Judges Van Dusen and Weis join in this dissenting opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Certified Judgment in Lieu of Mandate, dated July 8, 1974

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

EDWIN H. HELFANT

Appellant

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and the STATE OF NEW JERSEY

(D. C. Civil Action No. 607-73)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: SEITZ, *Chief Judge* and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

JUDGMENT ON REHEARING

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was reargued by counsel.

Certified Judgment in Lieu of Mandate, dated July 8, 1974

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed May 9, 1973, which dismissed the complaint be, and the same is hereby reversed. The order entered May 9, 1973, denying the motion for a preliminary injunction is vacated and the cause is remanded to the district court for the entry of an order temporarily enjoining the trial of Indictment No. SGJ-10-72-10 in the New Jersey courts until completion of the proceeding in the district court, unless the State of New Jersey stipulates to a postponement thereof. The district court proceeding shall be limited to a determination of whether Helfant's testimony before the state grand jury on November 8, 1972, was the product of a free and unconstrained will. It shall issue a declaratory judgment setting forth its conclusions. We direct that the trial be commenced forthwith and that the district court shall make findings of fact and conclusions of law within thirty days from the issuance of the mandate of this court.

ATTEST:

THOMAS F. QUINN
Clerk

July 8, 1974

Certified as a true copy and issued in lieu of a formal mandate on July 8, 1974.

Test: THOMAS F. QUINN
Clerk, United States Court of Appeals
for the Third Circuit

Copy

Order Recalling Certified Judgment in Lieu of Mandate and Staying Issuance of Mandate dated July 23, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1386

EDWIN H. HELFANT,

Appellant,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY

(D. C. Civil Action No. 670-73)

Present: SEITZ, Chief Judge and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

Upon consideration of appellees' motion to Recall Judgment in Lieu of Formal mandate, and for certain other relief, and brief in support thereof, and appellant's brief in opposition thereto, all in the above entitled case,

Order Recalling Certified Judgment in Lieu of Mandate and Staying Issuance of Mandate dated July 23, 1974

By direction of the Court, it is ORDERED that this Court's certified judgment, issued in lieu of formal mandate on July 8, 1974, be, and hereby is recalled; and

It is Further Ordered that the issuance of the certified judgment in lieu of formal mandate be, and hereby is stayed until August 7, 1974.

For the Court,

THOMAS F. QUINN
Clerk

Dated: July 23, 1974

Letter dated October 31, 1972, to John F. Callinan from Patrick T. McGahn, Jr.

John F. Callinan, Esq.
3311 New Jersey Avenue
Wildwood, New Jersey

Re: In the Matter of Edwin Helfant
Our File No. 2751

Dear John:

In the absence of Marvin, I want to tell you that Ed Helfant has been subpoenaed once again before the New Jersey State-wide Grand Jury on November 8th. It is his intention to take the Fifth Amendment.

As you know, we were up there once before and I enclose herewith a copy of that transcript in which he was compelled to go before the Grand Jury and take the Fifth. My position was that he should not have to go before the Grand Jury when he is the target of the investigation. I am having Jerry Gross check the law on the subject and I would like you to do likewise. A starting point, I beleive, is State v. C. Robert Sarcone, 93 N.J. super 501.

I would appreciate it likewise if you would have one of your fellows prepare a memorandum on this subject because time is of the essence and no doubt we will wind up again before Judge Kingfield.

Yours cordially,

/s/ Patrick T. McGahn, Jr.
For McGahn & Friss.

Affidavit of Samuel Moore

State of New Jersey,
County of Atlantic, } ss.:

Samuel Moore, of full age, duly sworn upon my oath according to law, depose and say:

1. Some time in August of 1972, while in my office at 533 Guarantee Trust Building, Atlantic City, New Jersey, I received a visit from William P. Sullivan, of the New Jersey State Police. He said, "This investigation does not concern you, this concerns Helfant." A brief discussion ensued concerning the Cantoni case, then he left.

2. About a week later, Detective Sullivan returned to my office and gave me a subpoena for the following Wednesday to appear before the State Grand Jury in Trenton. The following Wednesday I went to Trenton at the scheduled time of 1:00 p.m., and sat in the corridor until 5:00 p.m., and the Grand Jury was excused without my ever having been called before them. Detective Sullivan then called me into a room adjoining the Grand Jury room, and I met Deputy Attorney General Hayden for the first time. There were three other people in the room, whose identities were unknown to me.

3. Hayden then asked me what I knew about Helfant's involvement in the Cantoni matter. I replied I did not know anything about the Cantoni matter. Hayden then requested me to tell him anything I knew about Helfant. I told him I knew nothing about Helfant of my own knowledge. I was excused after three-quarters of an hour, without ever having been before the Grand Jury, even though my subpoena was to appear before the Grand Jury.

4. I was subsequently served with another subpoena to appear before the Grand Jury by Detective Sullivan, and proceeded to Trenton on the following Wednesday, and arrived at the designated time, which I think was 11:00 a.m. I waited in the corridor for over five hours, without ever being called before the Grand Jury on this occasion. The Grand Jury was dismissed, and Sullivan once again requested I come into the anteroom. I am sure that the same unidentified people were there with Mr. Hayden. Hayden once again began to question me about Helfant, and what I could tell him about Helfant. I told Mr. Hayden what I told him on the previous occasion, that I knew nothing about Helfant. I asked him if he wanted me to lie and make up some stories about Helfant, and he said, "No, we just want to know about Helfant," and he went into the Cantoni matter again. Mr. Hayden refused to believe anything I said, and I said to him, "You don't want to believe me—you would rather take the word of a drug pusher who is in State Prison." I was once again dismissed without ever being brought before the Grand Jury.

5. I received a third subpoena from Detective Sullivan, and I told him I had a vacation planned, and would not appear the following Wednesday, as I was leaving for a vacation on Monday. Due to my failure to appear, a warrant had been issued for my arrest, and upon my return I had to appear in Trenton on October 25, 1972 before Superior Court Judge Kingfield. While sitting in Judge Kingfield's waiting room for one-half hour with my attorney, L. Milton Freed, of Atlantic City, Deputy Attorney General Hayden and Detective Sullivan came out of Judge Kingfield's chambers just before Judge Kingfield came out to ascend the bench. They were in there at least one-half

hour, as I was sitting there for that period of time. My attorney asked if this matter could be heard in chambers, and Hayden insisted that it be heard in open Court. Judge Kingfield then ascended the bench, and Mr. Hayden requested that I be incarcerated. The Judge then sentenced me to one day in jail and fined me $100.00. My attorney informed the Court that I was to appear in front of the Grand Jury. Judge Kingfield then released me in the custody of my attorney for the purpose of appearing before the Grand Jury. I testified in front of the Grand Jury and then Detective Sullivan took me to the Mercer County Jail, where I was confined until 4:00 p.m.

6. On November 6, 1972, I received a call from the Administrative Director of the Courts, who told me that the Supreme Court wanted to see me at 9:50 a.m. on November 8th. I proceeded to Trenton and arrived there late due to the inclement weather, and went right before the Supreme Court in chambers. The first quection from Chief Justice Weintraub was whether I had called Detective Sullivan a "prick." This was a question that was asked in the Grand Jury session of October 25th. I had brought my file with me and had all the papers in front of me, not knowing what the Supreme Court was going to ask, as Mr. McConnell did not tell me what the Supreme Court wanted, but I assumed it was about the Cantoni matter. The Chief Justice then asked if I had a copy of the Cantoni Complaint with me, and when I told him I did, he asked me if he could have same. Helfant's signature was discussed.

7. Then there was some discussion about the $1500.00 check which had been located in Feinberg's office, and the Chief asked me what kind of office Feinberg had, and

Affidavit of Samuel Moore

I told him it had a fine reputation. I then stated to the Chief Justice that Sullivan should have told me he found the $1500.00 check in Feinberg's office, and the Chief said Sullivan is under no obligation to tell me anything about an official investigation. I was then excused by the Court.

(s) SAMUEL MOORE

NOTARIZED